(25,235)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 445.

MARTIN E. DONOHUE, PLAINTIFF IN ERROR,

vs.

BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, AND THE BUFFALO IRON MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

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1 STATE OF MICHIGAN:

Supreme Court.

MARTIN E. DONOHUE, Complainant and Appellant,
vs.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, and the BUFFALO IRON MINING COMPANY, Defendants and Appellees.

Appeal from Iron.

RECORD.

Bill of Complaint.

(Filed Dec. 9, 1913.)

STATE OF MICHIGAN:

The Circuit Court for the County of Iron. In Chancery.

To the Circuit Court for the County of Iron, in Chancery:

Martin E. Donohue, of the Township of Iron River in said county respectfully represents to the Court:

1st. That he is the owner in his own right and in fee simple of the following described lands in the County of Iron and State of Michigan, viz: The west half of the northwest quarter (W. ½ of the N. W. ¼) and the northwest quarter of the southwest
2 quarter (N. W. ¼ of the S. W. ¼) of section twenty-three (23) in town forty-three (43) north of range thirty-five (35) west, Michigan, and that he and the persons thru whom he claims have been the owner of such lands for more than twenty years last past, and that said property is of the value of more than $100.00. That your orator is now in possession of said premises, and that none of the defendants hereinafter named, excepting the defendant, Theodore H. Wickwire, Jr., are in possession of said premises or any part thereof.

2nd. That said premises were conveyed by the State of Michigan to the Lake Superior Ship Canal, Railway and Iron Company, a corporation, by virtue of certain acts of the legislature of the State of Michigan, as evidenced by the certificate of the governor of the State of Michigan, dated June 25th, 1875, a certified copy of which certificate was recorded on the 14th day of March, 1889, in Liber J of Deeds on page 41 in the office of the register of deeds of said county of Iron.

3rd. That the said Lake Superior Ship Canal, Railway and Iron Company did by a deed dated April 8th, 1891, recorded on the 25th day of August, 1891, in Liber O of Deeds on Page 237, in the office

of said register, convey said premises to the Keweenaw Association (Limited,) a limited copartnership association, and that the said Keweenaw Association (Limited) did by a conveyance dated on or about August 28th, 1908, to which reference is hereby made, convey all of said property to the Keweenaw Land Association (Limited,) a limited co-partnership association, and that the said Keweenaw Land Association (Limited) did by deed dated October 2nd, 1909, recorded October 21st, 1909, in the office of the register of deeds in Liber 16 of Deeds on Page 460 convey said premises to Michael Donohue, and that the said Michael Donohue did by deed
3 dated August 13th, 1913, convey said premises to your orator.

4th. That Bridget Donohue, the wife of the said Michael Donohue did by deed dated September 25th, 1913, convey her interest in said premises to your orator.

5th. That by reason of the premises, and of the other matters and things herein alleged your orator has become vested with the full and legal title to said premises.

6th. That your orator further alleges that one Michael Donohue entered into possession of said premises on or about the year 1884, claiming said premises as his own, and claiming the right to homestead said premises under the laws of the United States, and that the said Michael Donohue did all things required by the laws of the United States in connection with entering into, residing upon and making proof of residence upon said premises as a homestead, but that the right of the said Michael Donohue to homestead said premises was contested by the Lake Superior Ship Canal, Railway and Iron Company and by persons and corporations claiming thru and under it, and that thereupon and in connection with the title of the said Michael Donohue to said premises, certain suits in equity were brought in the United States Circuit Court for the Western District of Michigan, wherein the United States of America was complainant, and the said Lake Superior Ship Canal, Railway and Iron Company, the said Michael Donohue and others were defendants, for the purpose of testing the title of the said Michael Donohue in and to said property. That pending said litigation, a certain deed was placed on record in the office of the register of deeds for the County of Iron, in Liber P of Deeds on Page 275, being recorded on the 23rd day of April, 1895. That in said record of said
4 deed, the said Michael Donohue is named as a grantor and one Benjamin Vosper of Ionia, Michigan, is named as grantee. That said deed purports to convey from the said Donohue to the said Vosper an undivided ¼ interest in said lands. That said deed bears date the 29th day of December, 1895, and according to said record purports to be acknowledged on the 29th day of April, 1895, eight months prior to the date of its said execution, and was placed on record as hereinbefore alleged on April 23rd, 1895, a period of 8 months and 6 days prior to its date, and 6 days prior to the date of the certificate of acknowledgment affixed to said deed. That said deed purports to have been signed, sealed and delivered in the presence of M. J. Mitchell, and P. O'Brien, and purports to have been acknowledged on the day hereinbefore alleged before Patrick O'Brien, a Notary Public of Iron County, Michigan.

7. That your orator alleges that the said Michael Donohue has at all times denied the validity of said deed, and has at all times, and still does deny that he ever signed or executed said deed or delivered the same to the said Benjamin Vosper, and that your orator now alleges that said deed was not in fact signed by said Michael Donohue as his free act and deed, and that said deed does not, and did not at any time convey to the said Benjamin Vosper any title in and to said premises.

8th. That because of the apparent interest of the said Benjamin Vosper in and to said premises, he, the said Benjamin Vosper was made a party defendant to a cross-bill and supplemental cross-bill, filed by the Lake Superior Ship Canal, Railway and Iron Company, and its grantees, Keweenaw Association (Limited,) as complainants, against the United States of America, and the said Michael
5 Donohue and others as defendants, in the said Circuit Court in Equity for the Western District of Michigan, said cross-bill and supplemental cross-bill, being filed in connection with the suit pending between the same parties in said court hereinbefore mentioned. That by said cross-bill and supplemental cross-bill, it was prayed on behalf of the said Lake Superior Ship Canal, Railway and Iron Company, and its grantees that its title in and to said premises might be quieted and decreed to be a good title in fee simple as against the said Michael Donohue and against the said Benjamin Vosper, and as against the United States of America, as will more fully appear from said cross-bill and supplemental cross-bill, to which reference is hereby made.

9th. That said suits in equity hereinbefore referred to were removed from the United States Circuit Court for the Northern Division of the Western District of Michigan, in Equity, to the Southern Division of said District, in equity, on the 7th day of July, 1892, and that said suits afterwards on the 19th day of April 1905, came on for hearing before the said Circuit Court of the United States for the Western District of Michigan, Southern Division, at the City of Grand Rapids, before the Hon. George P. Wanty, Circuit Judge, upon the Bill of Complaint of the United States, and the answer of the defendants filed thereto, and upon the cross-bill and supplemental cross-bill of the Lake Superior Ship Canal, Railway and Iron Company, and its grantee, the Keweenaw Association (Limited,) and upon the demurrer of the defendants, Michael Donohue, Benjamin Vosper, and the United States of America, to said cross-bill and that the said defendant, Michael Donohue, by the said Benjamin Vosper, his solicitor, and the said Benjamin Vosper in person, in open court, withdrew their respective demurrers to said cross-bill and
6 supplemental cross-bill, and consented and conceded in open court that a Decree might be entered against him, the said Benjamin Vosper and the said Michael Donohue, as to their title in said premises, and that thereupon the said court then and there having jurisdiction of the subject matter, and of the parties, and having full authority and jurisdiction to pass upon the title of the said parties in and to said premises, did enter a decree wherein and whereby it was determined that the title to said premises at the time of the filing of the original bill in said cause, by the United

State of America to-wit, on the 18th day of December, 1890, was completely vested in the said Lake Superior Ship Canal, Railway and Iron Company as in part satisfaction of a grant to the State of Michigan, by the Act of Congress of July 3rd 1886, and had since the commencement of said suit, become and was at the date of said decree, fully vested in the Keweenaw Association (Limited,) and that neither the United States of America, nor the defendants, Michael Donohue, and Benjamin Vosper had any right, title or interest therein, and that said decree did in addition thereto, forever quiet the title to said premises in the said Keweenaw Association (Limited,) its successors and assigns, as against the United States of America, and as against each and every of the defendants in said cross-bill and supplemental cross-bill, including the defendant, Michael Donohue and Benjamin Vosper, and said Decree further provided that it should operate as a release and conveyance from the United States, and from each and every of the said defendants in said cross-bill and supplemental cross-bill, including the defendants Michael Donohue and Benjamin Vosper, of all claim, right, title or interest to said lands.

10th. That a copy of said Decree is attached hereto and made a part of this bill of complaint.

7 11th. That by virtue of said decree your orator alleges, and by virtue of the conveyance hereinbefore referred to from the Keweenaw Association (Limited,) to the Keweenaw Land Association (Limited,) the said Keweenaw Association (Limited) was on the 2nd day of October, 1909, the absolute owner of said premises, and that neither the said Michael Donohue, nor the said Benjamin Vosper, then had any title in or to said premises and that therefore the conveyance from the said Keweenaw Land Association (Limited) to the said Michael Donohue, dated October 2nd, 1909, recorded in Liber 16 of Deeds on Page 460, in the office of said register, and hereinbefore referred to, conveyed to said Michael Donohue a full and absolute title in and to said premises, and that the subsequent conveyances hereinbefore referred to from the said Michael Donohue and his wife, Bridget Donohue, to your orator, have vested in your orator a full and perfect title to said premises.

12th. That in addition to the matters hereinbefore alleged and as further evidence of the title of your orator in and to said premises your orator alleges that the said conveyance from the said Michael Donohue to the said Benjamin Vosper as hereinbefore alleged was never in fact executed or delivered by the said Michael Donohue to the said Benjamin Vosper, and that the said Benjamin Vosper did not by reason of said conveyance obtain or receive any right, title or interest whatsoever in or to said premises, and that said deed from the said Michael Donohue to the said Benjamin Vosper is and was wholly ineffective and of no force and effect, excepting that the record of said deed casts a cloud upon the title of your orator in and to said premises.

13th. That in further evidence of the title of your orator to said premises, he alleges that at the time of the execution of said
8 deed by the said Michael Donohue, to the said Benjamin Vosper, the said Michael Donohue had no record title to said

premises, but that the said Michael Donohue was then claiming the right to enter said land under the Homestead laws of the United States, and was claiming that said premises were public lands, subject to entry, and that the said Benjamin Vosper was then representing the said Michael Donohue as attorney and counsellor, for the said Michael Donohue in connection with the assertion of the right claimed by the said Michael Donohue in said premises under the homestead laws of the United States. That the said Michael Donohue had attempted to enter said lands under the laws of the United States of America, but that his right to make such entry and as such entryman was contested, and denied by the Lake Superior Ship Canal, Railway and Iron Company; that certain interests in said lands were in fact public, and were subject to entry, and that therefore it was illegal and unlawful and contrary to the statutes of the United States of America for the said Michael Donohue to convey said premises to the said Benjamin Vosper, or to any other person whatsoever, at the time he executed the deed to the said Benjamin Vosper, and that the said deed as executed by him to the said Benjamin Vosper, (if the same was ever executed) was illegal and executed contrary to the laws of the United States, and conveyed no interest whatsoever to the said Benjamin Vosper. That the said Benjamin Vosper, cannot now assert, under the covenants of warranty in said deed or otherwise thereunder, any rights against the said Michael Donohue or his grantee by way of estoppel or otherwise, for the reason that said deed (if executed) was in itself illegal and void, and executed contrary to the laws of the United States of America,

9 and that therefore no title thereafter acquired by the said Michael Donohue or by his assigns can or did inure to the benefit of the said Benjamin Vosper, or his assigns.

14th. That in further evidence of the title of your orator in and to said premises, he alleges that the said Michael Donohue claiming to be the owner of said premises, and being in possession thereof, and having been in possession thereof for more than ten years the last past did, on the 3rd day of December, 1896, execute and deliver to your orator, a deed of said premises, which said deed was recorded on December 3rd, 1896, in Liber P of Deeds on Page 555, in the office of the register of deeds of said county. That your orator at that time, and for more than ten years thereafter had no knowledge of the claim of the said Benjamin Vosper in and to said premises. That the said Michael Donohue had for more than ten years prior to December 3rd, 1895, been in possession of said premises, claiming them as his own, and in no wise recognizing or admitting any alleged right in said premises on the part of the said Benjamin Vosper but did, during all of said time, claim to be the absolute owner of said premises in fee simple, and held the same in open, hostile and adverse possession as against the whole world.

15th. That after the execution of said deed of December 3rd, 1896, by the said Michael Donohue to your orator, your orator took and continued in open, hostile and adverse and continuous possession of said premises, from the execution thereof, until the present time, and has at all times claimed to own said premises, and has never acknowledged, admitted or in any wise recognized any rights

in or to said premises on the part of the said Benjamin Vosper or any person claiming, by, thru or under him. That your orator has occupied said premises as his home, and has cultivated and worked a large portion of said premises as his farm, and that particu-
10 larly as to the surface of said premises he has and the said Michael Donohue before him, had for more than twenty years last past been in the adverse possession of said premises, as against all persons in any wise claiming any interest therein, so that if the said Benjamin Vosper did at any time acquire any right, title or interest in and to said premises by virtue of said alleged deed to him, his title and interest in and to said premises has been and is now entirely cut off and lost by reason of the adverse possession of your orator, and of the said Michael Donohue.

16th. That neither the said Benjamin Vosper nor any person claiming by, thru or under him has ever at any time been in any possession of said premises, or any part thereof. That notwithstanding the facts and circumstances hereinbefore set forth, the said Benjamin Vosper did by quit-claim deed, dated April 3rd, 1908, recorded April 7th, 1908, in the office of said register in Liber Y of Deeds on Page 542, attempt to convey to Fred H. Abbott, of Crystal Falls, Michigan, an undivided one-eighth interest in said premises.

17th. That the said Fred H. Abbott, did by deed dated February 2nd, 1909, recorded March 16th, 1909, in the office of the register of deeds in Liber 9 of Deeds on Page 612 undertake to convey an undivided one-thirty second interest in and to the ores and minerals in said premises to one Maurice Tonkin, of Crystal Falls, Michigan.

18th. That the said Fred H. Abbott, and Emma L. Abbott, his wife, by mortgage dated November 16th, 1909 and recorded November 18th, 1909, in Liber 12 of Deeds on Page 373, did mortgage an undivided three-thirty seconds interest in said premises to William A. Rogers, of Buffalo, N. Y., for the purpose of securing the sum of $2,500.00.

11 19th. That by lease, dated March 7th, 1910, recorded November 3rd, 1910, in the office of said Register of Deeds in Liber 10 of Miscellaneous Record on Page 520, the Niagara Iron Mining Company, a corporation, procured a mining lease on said premises, for a term of thirty years from the date thereof, which said lease was executed by your orator, and by the said Benjamin Vosper and Lucia, his wife, the said Fred H. Abbott, and Emma L. Abbott, his wife, and the said Maurice J. Tonkin, and others, as parties of the first part.

20th. That said lease was assigned by an instrument in writing dated October 16th, 1912, recorded October 25th, 1912, in the office of said register in Liber 12 of Miscellaneous Record on Page 247, by the said Niagara Iron Mining Company to Theodore H. Wickwire, Jr., and by him to the Buffalo Iron Mining Company, a Michigan corporation and that the said Buffalo Iron Mining Company is now in possession of a portion of said premises, for the purpose of carrying on mining operations.

21st. That under said mining lease, a quarter interest of all the royalties thus far accruing under said lease, have been paid to the

said F. H. Abbott, Maurice J. Tonkin and Benjamin Vosper, in the following proportions:

To the said Benjamin Vosper, 1/8th of said royalties.

To the said Fred H. Abbott, 3-32nds of said royalties.

To the said Maurice J. Tonkin, 1-32nds of said royalties, and that said one-quarter interest in said royalties has since the 7th day of March 1910, amounted to the sum of $1,000.00 per year.

22nd. That the said Buffalo Iron Mining Company threatens and intends to continue to pay said quarter interest in said royal-
12 ties to said Benjamin Vosper, Fred H. Abbott, and Maurice J. Tonkin, and refuses to pay the same or any part thereof to your orator, or recognize any right, title or interest on the part of your orator in and to said quarter interest.

23rd. That your orator therefore alleges that the said deed from the said Michael Donohue to Benjamin Vosper hereinbefore referred to and the said deeds from the said Vosper to the said Fred H. Abbott and from the said Fred H. Abbott to Tonkin are each a cloud upon the title of your orator in and to said quarter interest in and to said premises. That said deeds and each and all of them are without any force or effect whatsoever, and should be set aside and declared to be of no force or effect, and should be declared null and void, and that your orator should be decreed to be the owner in fee simple of a one-quarter interest which it is pretended was conveyed to the said Benjamin Vosper by the said Michael Donohue.

24th. Your orator also alleges that he is entitled to the quarter interest in said rents and royalties which have been paid to the said Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin, and that an accounting should be had between him and said persons for the purpose of ascertaining the amount due him, and that they each be decreed to pay to your orator the amount so found to be due him as royalties from said quarter interest in said premises.

25th. That the said Buffalo Iron Mining Company should be restrained by an order to desist from making any further payments under the said mining lease to the said Benjamin Vosper, Fred H. Abbott and the said Maurice J. Tonkin, and should be ordered and directed to make payment to your orator of all subsequent royalties arising from said quarter interest in said premises.

26th. That in addition to all other matters hereinbefore
13 set forth, your orator represents that at the time of the purchase of said premises by him from Michael Donohue, under the deed of December 3rd, 1896, hereinbefore referred to, your orator was entirely ignorant and unaware of any claim of any kind or nature whatsoever on the part of the said Vosper or any person claiming by, thru or under him. That the record of said alleged deed to the said Vosper from the said Michael Donohue was defective, and did not give your orator any constructive notice of its existence. That said record was defective amongst other things in that the instrument purported to be recorded prior to its date, and purported to be acknowledged prior to its date. That your orator paid to the said Michael Donohue a valuable consideration for said conveyances, and that your orator purchased the same in good faith believing that the said Donohue was the sole and absolute owner of

said premises, and that by reason thereof, your orator became the owner of said premises thru the said Michael Donohue, notwithstanding any right or title which the said Vosper might or could have by virtue of said alleged deed to him from the said Michael Donohue.

Your orator therefore prays:

1st. That the said deed from the said Michael Donohue to Benjamin Vosper and the subsequent deeds from the said Benjamin Vosper to Fred H. Abbott, and from the said Abbott to Maurice J. Tonkin, may each be decreed to be null and void and of no force and effect.

2nd. That if it should appear to this court that said deed to the said Benjamin Vosper was in fact executed, then that your orator may be decreed to be the owner of said quarter interest in fee simple by virtue of his adverse possession thereof, as herein alleged.

3rd. That the said Benjamin Vosper, Fred H. Abbott and
14 Maurice J. Tonkin may each be decreed to have no right, title or interest whatsoever in said quarter interest in said premises, or any part thereof, or in any of the rents and royalties arising therefrom.

4th. That your orator may be decreed to be the absolute owner in fee simple both of the surface and mineral of said quarter interest which it is claimed had been conveyed by the said Michael Donohue to the said Benjamin Vosper.

5th. That an accounting may be had between your orator and the said Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin for the purpose of ascertaining the amount due your orator on account of royalties paid to them under said mining lease on account of said quarter interest in said premises, and that said Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin may be decreed to repay to your orator said royalties so collected by them.

6th. That the said Buffalo Iron Mining Company may be enjoined from making any further payment under said mining lease to the said Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin, on account of said quarter interest in said premises therein, now claimed by them, until the right, title and interest of your orator in and to said premises has been determined by this court, and that upon the final hearing of this court, the said Buffalo Iron Mining Company Jr., may be permanently enjoined from making said payments, but may be ordered and directed to pay said royalties to your orator.

7th. That your orator may have such other and further
15 relief in the premises as to this court may seem equitable.

MARTIN DONOHUE,
Complainant.

A. H. RYALL,
Solicitor for Complainant.

Business Address—Escanaba, Michigan.

(Duly verified by complainant.)

COMPLAINANT'S EXHIBIT K.

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a Session of the Circuit Court of the United States for the Western District of Michigan, Continued and Held at the City of Grand Rapids, on the 19th Day of April in the Year of Our Lord One Thousand Nine Hundred and Five and of the Independence of the United States of America, the One Hundred and Twenty-ninth.

Present: the Honorable George P. Wanty, District Judge.

Among the proceedings then and there had were the following, to-wit:

No. 1165.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and the Keweenaw Association (Limited) The Metropolitan
16 Lumber Company, and the W. D. Wing Company (Limited), Defendants,

and

Cross Bill and Supplemental Cross Bill.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and the KEWEENAW ASSOCIATION (LIMITED), Complainants,
vs.
THE UNITED STATES OF AMERICA, MICHAEL J. MITCHELL, JAMES McGuire, George H. Fisher, Lyman P. Carter, George W. Reed, Fred Hanold, Peter Olsson, Isaac O. Wickstrom, Andrew Linder, Charles E. Stellar, Hugh Finan, Walter A. Cunningham, Garibaldi J. Graham, John J. Lyons, Barney Finan, Bernard Morgan, Hans Mohlberg, Louis King, Alexander J. Kelley, W. Lee Porter, Frederick Woempener, John I. Tufts, Thomas W. Kennedy, Harvey P. Clute, Peter Burke, Rosa Mary Fogelgren, John Lyng, Kate Harrington, John Burt, Ann Patterson, William R. Hopkins, Nelson E. Fisher, Fred H. Williams, Mattie E. Collins, Michael Burns, Henry Dier, August Johnson, Thomas Oleson, William Bird, Peter Paul, Basile Joly, Machael Donohue, John McHugh, David Leroy, Felix Joutrau, William T. Walsh, John Lynch, Joseph Pourier, William H. Webb Hector McPhee, Cortland P. Hughes, George Abel, William Davis, William Whitney, Nahum Dunsmore, John Andree, Charles Kadman, Albon F. Root, George Steele, Charles B. Stewart, Thomas Hoffer, Thomas H.
17 Webb, James Farley, Jr., David Davis, Patrick Brady, William Judge, H. Frazer Warren, Scylla Hordi, John W. Stiles,

Patrick E. Connors, Charles Vieth, Louis Pourier, James S. Dickie, John Strand, Miles Earles, Charles Ingram, John Gartland, Michael Sullivan, Charles T. McElroy, Clovis Lefebvre, Patrick Griffin, August Clewein, Eliza Kane, George N. Pidd, August Westphal, John M. Wright, Theron R. Davis, Ole Flesvig, Victor Puczylowski, Willard P. Cook, Walter Roozen, Jacob Brewer, Rasmus Jorgensen, Leander Belleville, Benjamin Vosper, Branch Harris, and William H. Moody as Successor in Office of Richard Olney, as Attorney General of the United States, Defendants.

Honorable George G. Covell, United States District Attorney, appearing on behalf of the United States of America, and on behalf of the Attorney General of the United States, in the original and amended Bills and on the cross bill and supplemental cross bill.

Messrs. Ball & Ball appearing for all the defendants in the original and amended bills, and for the complainant in the cross bill and supplemental cross bill.

Benjamin Vosper appearing in propria persona and on behalf of all the defendants in all the bills except as above mentioned and except as hereinafter mentioned as being in default.

This cause having been duly removed to this court by order of the Circuit Court of the United States for the Northern Division of this District, in Equity, entered therein on the 7th day of
18 July, A. D. 1892, came on to be heard at this term upon the amended bill of complaint of the United States, and the answer of the defendants filed thereto, and the replication of the United States to said answer, and upon the cross bill and supplemental cross bill of the said The Lake Superior Ship Canal, Railway and Iron Company and the Keweenaw Association (Limited), against the United States and the other defendants named therein, and the demurrer of all the defendants to said cross bill except the defendants George Abel, William Judge, John Gartland, Patrick Griffin, George N. Pidd, August Westphal, John M. Wright, Victor Puczylowski, Willard P. Cook, Walter Roozen, Jacob Brewer and Leander Belleville, and upon the said cross bill taken as confessed against the twelve last named defendants.

And the said United States, by George G. Covell, Esquire, District Attorney, withdraws the replication filed by the said United States to the answer of the said defendants, as well as its demurrer to the said cross bill and supplemental cross bill, and the other defendants demurring to said cross bill, by Benjamin Vosper, their solicitor, in open court withdraw their demurrer to said cross bill and supplemental cross bill, upon which said cause was heard, all of the parties to this cause being in court upon the said original and amended bills and answer, and upon said cross bill, all said defendants in said cross bill and said supplemental cross bill waiving in open court their right to answer said cross bill and said supplemental cross bill, and upon the documentary proofs filed on behalf of the complainants in said cross bill, the said United States offering no proofs in support of said original or amended bills, and consenting to the entry of this

decree, and the said defendants to said cross bill offering no
19 proofs in opposition thereto and conceding this decree to be correct on the showing made herein.

And it appearing to the court that decrees have heretofore been entered herein, by consent, against the said United States and the said Michael J. Mitchell, James McGuire, George H. Fisher, Lyman P. Carter, George W. Reed, Andrew Linder, Walter A. Cunningham, John J. Lyons, Bernard Morgan, Louis King, Alexander J. Kelly, W. Lee Porter, Peter Burke, Rosa Mary Fogelgren, Kate Harrington, John Burt, Ann Paterson, William R. Hopkins, Fred H. Williams, Mattie E. Collins, Michael Burns, August Johnson, Thomas Oleson, William Bird, Peter Paul, Basile Joly, Michael Donahue, John McHugh David Leroy, Felix Joutrau, William T. Walsh, John Lynch, Joseph Pourier, William H. Webb, Hector McPhee, William Whitney, H. Frazier Warren, John Strand, Charles Ingram and Ole Flesvig, defendants named in said supplemental cross bill, as to the lands claimed by the said several last named defendants, quieting the title to said lands in the said The Keweenaw Association (Limited) and dismissing the bills of the United States as to said lands.

And it appearing by the pleadings in this cause and by said documentary evidence so filed on the hearing, that the said The Keweenaw Association (Limited) is, and that the said The Lake Superior Ship Canal, Railway and Iron Company was, at the time of the commencement of this suit, the lawful owner in fee simple of all the lands described in the original and amended bills of complaint filed by the United States in this cause, and that neither the United States nor the defendants named in said supplemental cross bill, nor any or either of them, had, or now have, nor are they or any of them entitled to any right, title or interest therein; and it further
20 appearing from the documentary proofs so filed as aforesaid that the title to all the said lands has been finally adjudged by the Interior Department of the United States to have been duly granted and certified to the said The Lake Superior Ship Canal, Railway and Iron Company and that its title thereto under such certification has been by the Interior Department of the United States confirmed;

Thereupon it is ordered, adjudged and decreed as follows, viz:

1. That the relief prayed for by the said United States in the original and amended bills filed by it in this cause, be, and the same and every part thereof, is hereby denied.

2. That in accordance with the prayer of the complainants in said cross bill, it is adjudged that the title to all the lands described in said amended bill of the United States, at the time of the filing of said original bill, was completely vested in said The Lake Superior Ship Canal, Railway and Iron Company, as in part satisfaction of a grant to the State of Michigan, by the Act of Congress of July 3, 1866, and has, since the commencement of this suit, become, and is now fully vested in said The Keweenaw Association (Limited) and that neither the United States of America nor any of the defendants

in said cross bill or in said supplemental cross bill named, has any right, title or interest therein.

3. That the title of the said The Keweenaw Association (Limited) in and to each and every of the parcels of land described in said amended bill, and hereinafter described, be and the same is hereby forever quieted in the said The Keweenaw Association (Limited) its successors and assigns, as against the United States of America, and as against each and every of the defendants named in the said cross bill and supplemental cross bill.

21 4. That this decree shall stand and operate as a release and conveyance from the United States, and from each and every of the other of said defendants in said cross bill and said supplemental cross bill named, of all claim, right or title to said lands, and to any timber that may have been cut therefrom by the said The Lake Superior Ship Canal, Railway and Iron Company, or any of its grantees, and may be recorded as such in the records of the proper county or counties.

5. That all bonds that have been given or filed in this cause, pursuant to the orders of the court therein, by the said The Lake Superior Ship Canal, Railway and Iron Company, The Keweenaw Association (Limited) The Metropolitan Lumber Company and the W. D. Wing Company (Limited) or by any of them, be and the same are hereby cancelled and discharged.

6. No costs will be allowed to any parties hereto.

7. The lands, the title to which and the timber cut wherefrom is hereby decreed to be in The Keweenaw Association (Limited) as against all other parties hereto, are situated in the Northern Division of the Western District of Michigan, and are particularly known and described as follows:

* * * west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-three (23) all in township number forty-three (43) north of range thirty-five (35) west. * * *

22 *Answer of the Defendants Vosper, Abbott and Tonkin.*

Filed Feb. 13, 1913.

The Joint and Several Answer of Benjamin Vosper, Fred H. Abbott, and Morris J. Tonkin, Defendants, to the Bill of Complaint of Martin Donohue, Complainant, Exhibited Against These Defendants and Others.

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto, or to so much thereof as they are advised is material for them to make answer unto, answering say:

1. They deny each and every allegation contained in paragraph number one of said bill, except that they admit that the property therein described is of the value of more than one hundred dollars.

2. In answer to paragraph number two of said bill of complaint,

these defendants admit that some time prior to the year 1890 the Lake Superior Ship Canal, Railway & Iron Company, a corporation mentioned in said paragraph, became the owner in fee simple of the land described in said bill, but as to the exact method by which the title became so vested these defendants have no information sufficient whereon to found a belief, and they submit that the same is immaterial, and they leave said complainant to such proof thereof as he may deem to be material.

3. Answering the third paragraph of said bill, these defendants admit that the said Lake Superior Ship Canal, Railway & Iron Company, about the time mentioned in said paragraph, conveyed said premises to the Keweenaw Association, (Limited,) a partnership association, formed and existing under the laws of this state,
23 but they deny that said Keweenaw Association (Limited,) on the 28th day of August, 1908, or at any other time, conveyed said land to the Keweenaw Land Association (Limited,) but allege that prior to said date, and about the month of November, 1896, said Keweenaw Association (Limited,) conveyed said land by deed to Michael Donohue, a person mentioned in said bill of complaint, and after the execution of said deed said Keweenaw Association, (Limited,) never had or claimed to have any interest in or title to said land.

These defendants have no information sufficient whereon to found a belief as to whether said Michael Donohue executed a deed August 13, 1913, purporting to convey said lands to the said complainant or not, and they leave said complainant to his proof thereof. But they allege upon information and belief that said Michael Donohue before that time, and about the month of December, 1896, by quit-claim deed, conveyed all the right, title and interest which he then had in said land to said complainant.

4. These defendants have no information sufficient whereon to found a belief as to the allegations contained in the fourth paragraph of said bill, and leave said complainant to his proof thereof.

5. They deny all the allegations contained in the fifth paragraph of said bill.

6. These defendants have no knowledge sufficient whereon to found a belief as to whether the said Michael Donohue entered into possession of said premises at the time mentioned in said paragraph, but they admit that he was, or claimed to be in possession thereof in the year 1888, claiming that said land was then public land of the United States and that he had a right to acquire the same under the homestead or preemption laws of the United States, and that he did offer proof tending to show residence upon said premises for
24 the purpose of obtaining title thereto from the United States under the homestead or preemption laws, but whether he did all things that would have been required by the laws of the United States in connection therewith, if said lands had been lands of the United States, these defendants, and particularly the defendants, Fred H. Abbott and Morris J. Tonkin, have no information sufficient whereon to found a belief, and they allege that the same is immaterial to this case, and they leave said complainant to such proof thereof as he may see fit to make. These defendants admit that the

right of said Michael Donohue to obtain said land under the homestead or preemption laws of the United States was contested by the Lake Superior Ship Canal, Railway & Iron Company, and also by the Keweenaw Association, (Limited,) and that in connection with the claim of title of said Michael Donohue to said premises a certain suit in equity was brought in the Circuit Court of the United States for the Western District of Michigan, wherein the United States of America was complainant, and said Lake Superior Ship Canal, Railway & Iron Company and others were defendants, in which suit the said Lake Superior Ship Canal, Railway & Iron Company filed a cross bill, and subsequently the said Lake Superior Ship Canal, Railway & Iron Company and the Keweenaw Association, (Limited,) filed a supplemental cross bill, in which supplemental cross bill said Michael Donohue and others were made defendants, for the purpose, among other things, of testing the title of said Michael Donohue and others to said premises, the United States of America in said litigation claiming that it was the owner of said lands and that the same were subject to homestead and preemption entry. They admit that pending said litigation there was placed on record in the office of the register of deeds for the County of Iron, and on or about
25 the 23rd day of April, 1895, in Liber P of Deeds at page 275, a certain deed purporting to be executed and which was in fact executed by said Michael Donohue as grantor, conveying to the defendant Benjamin Vosper, of Ionia, Michigan, the undivided one-fourth interest in the lands described in said bill. They deny that said deed bears date the 29th day of December, 1895, and they also deny that said deed purports to be acknowledged on the 29th day of April, 1895, but they say that said deed bears date the 29th day of December, 1894, and that the same was acknowledged before Patrick O'Brien, Notary Public for Iron county, on the 29th day of December, 1894, and that if the dates of execution and acknowledgement appear by the record as set forth in said bill, said dates were inserted in said record by clerical mistake and error of the register of deeds. Said deed was actually executed and delivered upon the day of its date and acknowledgment, and was recorded, as before stated, on the 23rd day of April, 1895.

7. These defendants deny each and every allegation contained in the seventh paragraph of said bill, and they aver that the said Michael Donohue has never at any time to the knowledge of these defendants, or either of them, denied the validity of said deed.

8. These defendants admit the allegations contained in the eighth paragraph of said bill.

9. These defendants admit the allegations contained in ninth paragraph of said bill, but they allege that prior to the entry of the decree therein mentioned, and about the 17th day of November, 1896, a similar decree, by consent of all parties, including the said Michael Donohue who was defendant to the cross bill aforesaid, was entered by said court in said cause, whereby it was adjudged that, at and before the commencement of said suit by the United
26 States, the said Lake Superior Ship Canal, Railway & Iron Company was the owner in fee simple of the land described in said bill and other lands, and that at the time of the entry of said

decree, the said Keweenaw Association, (Limited,) was the owner of said land, and by said decree the title of said Keweenaw Association (Limited,) was forever quieted as against the said Michael Donohue and certain other parties named in said cross bill and in said decree. A copy of said decree is hereto annexed, marked "Exhibit A," and made a part hereof.

10. These defendants admit that on the 19th day of April, 1905, a decree was entered in said cause, of which they believe the copy attached to said bill of complaint is substantially a copy, but they have no information as to whether said copy is an exact copy of said decree or the whole thereof, and therefore they neither admit nor deny he same, but they do admit that the said decree was substantially in accordance wih the aforesaid copy.

11. These defendants admit that by virtue of the decree hereinbefore mentioned, dated November 17, 1896, the title of said Keweenaw Association (Limited,) to said lands was confirmed and quieted, and that it was thereby adjudged that the said Keweenaw Association, (Limited,) was the owner in fee simple of said lands. They deny that the said Keweenaw Association, (Limited,) ever conveyed the same to the said Keweenaw Land Association (Limited,) or that said last named association ever conveyed the same to the said Michael Donohue, but they allege that the deed referred to as having been made by said Keweenaw Land Association, (Limited,) dated October 2, 1909,, was not a conveyance to said Michael Donohue, but was a disclaimer of all title and a quit-claim of any possible interest, right or title that the said Keweenaw Land Association, (Limited,) may have been then supposed to have, to the several parties to whom said Michael Donohue had before then executed deeds purporting to convey said lands, and they deny that said Michael Donohue, or the said complainant, by virtue of said deed of October 2, 1909, obtained or acquired any other or additional interest in said land than he already had, which was not to exceed the undivided three-fourths thereof, and they deny that said complainant is or ever was the owner of any interest in said land exceeding the undivided three-fourths thereof.

12. These defendants deny each and every allegation contained in the twelfth paragraph of said bill.

13. They admit that at the time of the execution of said deed by the said Michael Donohue to the defendant Benjamin Vosper, the said Michael Donohue had no record title to said premises, but that he, said Michael Donohue, was then claiming not merely the right to enter said land under the preemption laws of the United States, but was claiming to be the owner thereof under and by virtue of such alleged occupation thereof, and under and by virtue of an act of congress approved March 2nd, 1889, which he claimed had confirmed his claim of title thereto. They admit that said Benjamin Vosper was at that time representing the said Michael Donohue as his attorney in connection with the assertion of the right so claimed by him under the homestead or preemption laws of the United States, and by virtue of the alleged confirmation thereof by the act of Congress aforesaid. They admit that said Michael Donohue had attempted to enter said lands under the laws of the United States of

America, claiming that the same were public lands of the United States, but that his right to make such entry, and his claim that said lands were public lands of the United States, were con-
28 tested and denied by the Lake Superior Ship Canal, Railway & Iron Company and also by the said Keweenaw Association, (Limited). They deny that any interest in said lands was in fact public, or that the United States had any interest whatever in said lands at the time said deed was given, or that they were subject to entry, and deny that it was illegal and unlawful or contrary to the statutes of the United States of America for said Michael Donohue to convey said premises to the said Benjamin Vosper at the time he executed said deed. They deny that said deed as executed by said Michael Donohue to said Benjamin Vosper was illegal and contrary to the laws of the United States, and that it conveyed no interest whatever to the said Benjamin Vosper. They deny the allegation contained in said paragraph that said Benjamin Vosper cannot now assert under the covenants of warranty in said deed, or otherwise thereunder, any rights against the said Michael Donohue or the said complainant by way of estoppel or otherwise, for the reason alleged in said paragraph or for any other reason, and they also deny the allegation therein contained that no title thereafter acquired by the said Michael Donohue or his assigns can or did inure to the benefit of said Benjamin Vosper or his assigns.

14. They deny each and every allegation contained in the fourteenth paragraph of said bill, except they admit the execution and delivery of the deed from said Micheal Donohue to said complainant in said paragraph mentioned.

15. They deny each and every allegation contained in the fifteenth paragraph of said bill, except that they admit that said complainant, for a short period of time has occupied a portion of the surface of said premises and claimed the same as his home, and for a short time cultivated a portion of the surface thereof, but they deny
29 that said complainant has ever held or occupied the same adversely to said Benjamin Vosper or to any person claiming under him, and they deny the allegation contained in said paragraph that said complainant has never acknowledged, admitted or in any wise recognized any rights in or to said premises on the part of said Benjamin Vosper or of any person claiming through or under him, but that on the contrary, the said complainant has repeatedly for more than five years last past recognized and acknowledged the rights of the defendant, Benjamin Vosper, and of the other defendants claiming under him, and they deny that the right and title of said Benjamin Vosper, or of either of the other of said defendants hereto, has been cut off or barred by any adverse possession on the part of the said complainant or of said Michael Donohue, or both of them, or of any other person.

16. They deny each and every of the allegations contained in the sixteenth paragraph of said bill, except that they admit the execution and delivery and recording of the deed referred to in said paragraph sixteen, and aver that said deed conveyed to said Fred H. Abbott in fee simple an undivided one-eighth of said property.

17. They admit the allegations contained in the seventeenth paragraph of said bill.

18. They admit the allegations contained in the eighteenth paragraph of said bill.

19. They admit the allegations contained in the nineteenth paragraph of said bill, and allege further that the lease therein mentioned was given pursuant to a contract previously made and executed in the year 1908, being a contract in writing executed by the said complainant and these defendants.

20. They admit the allegations contained in the twentieth
30 paragraph of said bill, and allege that the said Buffalo Iron Mining Company is in such possession of said premises as a tenant of said complainant and these defendants under the lease aforesaid.

21. They admit the allegations contained in the twenty-first paragraph of said bill.

22. They admit the allegations contained in the twenty-second paragraph of said bill.

23. They deny that the deeds mentioned in the 23rd paragraph of said bill are a cloud upon any title or interest of the said complainant in and to said lands, or any interest therein, and they deny that the said complainant has any title to or interest in the undivided one-fourth interest referred to and mentioned in said paragraph. They deny that said deeds are without any force or effect or that the same should be set aside or declared to be null and void, and they deny that the said complainant should or ought to be decreed to be the owner in fee simple of the one-quarter interest which was conveyed to the said Benjamin Vosper by said Michael Donohue.

24. They deny each and every allegation contained in the twenty-fourth paragraph of said bill.

25. They deny each and every allegation contained in the twenty-fifth paragraph of said bill.

26. They deny each and every allegation contained in the twenty-sixth paragraph of said bill.

27. Further answering the said bill of complaint, these defendants show unto the court:

A. About the year 1889, the said Michael Donohue employed the defendant, Benjamin Vosper, as his attorney to aid him in procuring the title to the lands described in said bill. Prior to that time the said Michael Donohue had entered upon said lands for the purpose of acquiring title thereto under the preemption laws of
31 the United States, claiming that they were public lands of the United States, and had sought to file his declaratory statement therefor pursuant to said preemption laws. The Lake Superior Ship Canal, Railway & Iron Company, a corporation of the state of Michigan, claiming to be the owner of said lands, had commenced a suit in ejectment against said Michael Donohue, for the purpose of establishing its title and recovering possession thereof, in the Circuit Court of the United States for the Northern Division of the Western District of Michigan, and said ejectment suit was then pending, and pursuant to said employment the law firm of Vosper

Brothers, of which said Benjamin Vosper was a member, was substituted as attorneys for said Michael Donohue in said cause. Said ejectment case was afterwards brought to trial in said court and was defended by said Benjamin Vosper as attorney for said Michael Donohue, and said trial resulted in a judgment in favor of the said Lake Superior Ship Canal, Railway & Iron Company and against the said Michael Donohue. Said Benjamin Vosper in behalf of said Michael Donohue took out a writ of error and removed the said cause thereon to the Supreme Court of the United States and procured a reversal of said judgment and an order for a new trial thereof.

B. Said Michael Donohue, being unable to pay said Benjamin Vosper reasonable fees for his services as such attorney, or for the expenses incurred therein, agreed that said Vosper should receive for his said fees and expenditures one-fourth of all that should be recovered in the litigation and other proceedings concerning the title to said lands, and for the purpose of carrying said agreement into effect, claiming to be the owner of said land under the confirmatory act of the Congress of the United States approved
32 March 2nd, 1889, on the 29th day of December, 1894, executed and delivered to the said Benjamin Vosper a warranty deed purporting to convey to said Vosper the undivided one-fourth of all the aforesaid lands, and in and by said deed said Michael Donohue did in the usual form covenant to and with the said Vosper, his heirs and assigns, that he was then well seized of the said premises in fee simple, that they were free from all incumbrances whatever, and that he would, and his heirs, executors and administrators should warrant and defend the same against all lawful claims whatsoever. Said deed was duly witnessed and acknowledged on said 29th day of December, 1894, before Patrick O'Brien, a Notary Public for said county of Iron, and was recorded on the 23rd day of April, 1895, in Liber P of Deeds, Page 275. Said deed is now in the possession of the said Benjamin Vosper, one of these defendants, and is ready to be produced and proved as this Honorable Court shall direct.

C. Said Benjamin Vosper soon after the execution of said deed instituted and prosecuted proceedings in the Interior Department of the United States for the purpose of establishing the right and title of said Michael Donohue to said lands. Said proceedings were contested by said Lake Superior Ship Canal, Railway & Iron Company, which company claimed the title to said lands under and through a grant made by the Congress of the United States to the State of Michigan by act approved July 3, 1866, and that its title under said grant was confirmed by the aforesaid act of Congress of March 2, 1889, and that the claim of said Michael Donohue was not confirmed thereby.

D. At the solicitation of said Michael Donohue and others who were making similar claims under the preemption and homestead laws of the United States to other lands similar situated, a
33 bill was filed by the United States in the Circuit Court of the United States for the Northern Division of the Western District of Michigan in equity against the said Lake Superior Ship Canal, Railway & Iron Company, having for its object the obtain-

ing of a decree declaring that said lands and other lands similarly situated were public lands of the United States and subject to homestead and preemption claims, being the bill mentioned and set forth in the bill of complaint in this cause. Said Lake Superior Ship Canal, Railway & Iron Company and the Keweenaw Association, (Limited,) to which last named company the said Lake Superior Ship Canal, Railway & Iron Company had transferred its rights, filed their cross bill in said cause as set forth in the bill of complaint, claiming title to said lands and the other lands involved in said litigation. In said cross bill said Michael Donohue and numerous other parties similarly situated were made defendants, and the complainants in said cross bill sought to have their title declared and quieted in said cause.

E. Pending said equity suit, under and pursuant to an order of said court, the complainants in said cross bill were permitted, by themselves and their assigns, to cut and remove from said lands a large quantity of valuable pine timber, on giving a bond to account for the value thereof to the United States or to such persons as should be adjudged entitled to such accounting. It still remained uncertain whether, in case the United States should succeed in said equity suit, the value of the timber so cut would belong to and be paid to the United States or to the said Michael Donohue. In the month of November, 1896, after extended negotiations with the complainants in said cross bill and with the Interior Department and the Department of Justice of the United States, the said Benjamin
34 Vosper, with the consent of said Michael Donohue, concluded a compromise, whereby, by the consent of the United States and of the complainants in said cross bill and of the said Michael Donohue, and of several of the other defendants in said cross bill, a decree was to be entered in said suit declaring that the title to said lands in fee simple had, prior to the commencement of said litigation, vested in the said Lake Superior Ship Canal, Railway & Iron Company and was then in said Keweenaw Association, (Limited,) as the grantee of said Lake Superior Ship Canal, Railway & Iron Company. By said compromise it was agreed that in settlement of the entire claim of said Michael Donohue, including his claim for the timber that had been cut from said lands, said Michael Donohue should receive a sum of money then agreed upon, and that said Keweenaw Association (Limited,) should convey the land as it then was, the pine timber, having been removed, to the said Michael Donohue. Thereupon in pursuance of said compromise agreement, and by consent of the United States and of the said Michael Donohue and of the complainants in said cross bill, such decree was on the 17th day of November, 1896, pronounced by the said court and entered upon its records, a copy of which decree has been herein above referred to and is annexed to this answer marked "Exhibit A."

F. Upon the entry of said decree the said Keweenaw Association, (Limited,) paid to the said Michael Donohue the sum of money agreed upon in and by said compromise agreement, and also in pursuance thereof, on or about the 19th day of November, 1896, said Keweenaw Association, (Limited,) executed and delivered to said Michael Donohue a deed of said premises, whereby said Keweenaw

Association, (Limited,) granted, sold, conveyed and quit-
35 claimed to said Michael Donohue all the lands described in said bill.

G. These defendants allege that by reason of the matters hereinbefore set forth it was conclusively established as between the said Michael Donohue and the said Benjamin Vosper that the said lands were not public lands of the United States at the time of the commencement of said suit, which was about the 19th day of December, 1890, nor at any time thereafter; that under and through the warranty deed executed by said Michael Donohue to the said Benjamin Vosper as aforesaid, the subsequently acquired title of the said Michael Donohue in and to said lands inured to the benefit of said Benjamin Vosper, and that the title to the undivided one-fourth thereof became and was duly and completely vested in him in fee simple.

H. Afterwards, as stated in said bill, the said Benjamin Vosper by deed conveyed to the defendant, Fred H. Abbott the undivided one-eighth of said land, and the said Fred H. Abbott conveyed to the defendant, Morris J. Tonkin, the undivided one thirty-second thereof.

I. Said Michael Donohue has never, to the knowledge of these defendants, disputed or questioned the title so conveyed by him to said Benjamin Vosper, nor has the said Martin Donohue disputed or questioned the said title until at or shortly before the time of commencement of this suit. On the contrary, the said Martin Donohue in the year 1908, joined with these defendants in an option contract for a lease of said lands for mining purposes, and in pursuance of said contract, on or about the 7th day of March, A. D. 1910, he joined with these defendants in the execution of a lease to the Niagara Iron Mining Company, a corporation of this state, whereby the said complainant, together with these defendants,
36 did lease and demise to said Niagara Iron Mining Company all the said lands for the term of thirty years from the date thereof, for the purpose of exploring for and mining, taking out and removing therefrom the iron ore which might be found on said lands, together with the right to construct buildings, erect machinery and fixtures, and do all other things necessary or convenient for the purpose of mining and removing ore from said premises, and the assignee of said lease, being, as these defendants are informed, the Buffalo Iron Mining Company, mentioned in the bill of complaint in this cause, is now in possession of said premises under said lease as the tenant of said complainant and these defendants.

J. These defendants by their answer claim the benefit of a cross bill, and pray that said bill of complaint may be dismissed, and that under their said cross bill it may be decreed by this court that they are the owners in fee simple of the undivided one-fourth of the lands described in said bill; that their title thereto be by the decree of this court quieted as against said complainant and all persons claiming under him; that said complainant by proper deed release and convey to these defendents all right, claim or demand in said lands, and that in default thereof, or until such deed of release or conveyance be given, such decree may be recorded in the proper office and oper-

ate as such release and conveyance, and that these defendants may recover against the said complainant their reasonable costs and charges by them about their defense in this behalf expended.

BENJAMIN VOSPER,
FRED H. ABBOTT,
MAURICE J. TONKIN,
BALL & BALL,
Solicitors and of Counsel for said Defendants.

Business address—Marquette, Michigan.

37 EXHIBIT A.

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

In Equity.

At a Session of said Court, Held at the Court-room thereof, in the City of Grand Rapids, on the Seventeenth Day of November, in the Year Eighteen Hundred and Ninety-six.

Present: Honorable H. F. Severens, District Judge, sitting as Circuit Judge.

In the case of

UNITED STATES, Complainant,

vs.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY, THE Keweenaw Association (Limited), Metropolitan Lumber Company, and the W. D. Wing Company (Limited), Defendants.

And the case of

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and THE KEWEENAW ASSOCIATION (Limited), Complainants,

vs.

UNITED STATES OF AMERICA and Others, Defendants.

Cross Bill.

In this cause the United States of America, complainant in the said original bill, and one of the defendants in the cross bill,
38 and also Mitchel J. Mitchell, Lyman P. Carter, John Lynch, William H. Webb, James McGuire, George H. Fisher, George W. Reed, W. Lee Porter, Fred H. Williams, Basile Joly, August Johnson, Michael Donohue, Joseph Pourier, Peter Burke, David Leroy, Hector McPhee, Rosa Mary Fogelgren, Walter A. Cunningham, William A. Whitney, and Benjamin Vosper, defendants in said cross bill named, come into court by their re-

spective solicitors, who have been duly authorized thereto and acknowledge that the said Keweenaw Association, (Limited), is, and the said Lake Superior Ship Canal, Railway and Iron Company was, at the time of the commencement of this suit, the lawful owner in fee of the lands hereinafter described, part and parcel of the lands described in the original bill filed by the United States against said companies, and that neither the said United States nor the said Michael J. Mitchell, Lyman P. Carter, John Lynch, William H. Webb, James McGuire, George H. Fisher, George W. Reed, W. Lee Porter, Fred H. Williams, Basile Joly, August Johnson, Michael Donohue, Joseph Pourier, Peter Burke, David Leroy, Hector McPhee, Rosa Mary Fogelgren, Benjamin Vosper, Walter A. Cunningham and William A. Whitney, nor any of them are entitled thereto, or to any interest therein.

Therefore by consent of said United States of America and of said Michael J. Mitchell, Lyman P. Carter, John Lynch, William H. Webb, James McGuire, George H. Fisher, George W. Reed, W. Lee Porter, Fred H. Williams, Basile Joly, August Johnson, Michael Donohue, Joseph Pourier, Peter Burke, David Leroy, Hector McPhee, Rosa Mary Fogelgren, Benjamin Vosper, Walter A. Cunningham and William A. Whitney, by their respective solicitors duly made in open court, and by Rush Culver, Esq.,
39 an attorney of this court, specially authorized thereto by certain of said defendants, and on motion of Dan H. Ball, Esq., solicitor for defendants in said original bill, complainants in said cross bill, it is by the court now here ordered, adjudged and decreed that the said bill of the United States, as to the lands hereinafter described, be, and the same is hereby dismissed, but that as to the remainder of the lands described therein said bill stand for hearing as if this decree had not been made.

And on motion of said solicitor for complainants in said cross bill, and by consent of the United States, and the said other defendants hereinbefore named, given as aforesaid, and in accordance with the prayer of said cross bill, it is ordered, adjudged and decreed, and this court by virtue of the authority therein vested, doth order, adjudge and decree, that the title to the lands hereinafter described, part and parcel of the lands described in the original bill of the United States, as aforesaid, at the time of the commencement of this suit, was fully and completely vested in the Lake Superior Ship Canal, Railway and Iron Company, as in part satisfaction of the grant to the state of Michigan by the act of Congress of July 3, 1866, and has, since the commencement of this suit, become, and is now fully and completely vested in said Keweenaw Association, (Limited), and that neither the United States of America nor any of the defendants aforesaid consenting to this decree, has any right, title or interest therein.

And it is further ordered, adjudged and decreed that the title of said Keweenaw Association, (Limited), in and to each and every of the parcels of the land hereinafter described, be, and the same is hereby, forever quited in the said Keweenaw Association, (Limited), as against the said United States of America and each

and every of the said defendants in the said cross bill hereto
40 consenting and herein named.

This decree shall stand and operate as a release and conveyance from the United States, and each and every of the other of said defendants, of all right and title to said lands, and may be recorded as such in the records of the proper county.

The lands, the title whereof is hereby decreed to be in the said Keweenaw Association, (Limited), together with the names of the several defendants in said cross bill who have heretofore claimed title to or interest therein, and against whom the said title is by this decree quieted are as follows, to-wit:

West half of northwest quarter and northwest quarter of southwest guarter of section twenty-three, township forty-three north, of range thirty-five west, claimed by Michael Donohue. * * *

H. F. SEVERENS,
U. S. District Judge.

Answer of Complainants to Defendants' Cross Bill.

(Filed March 5, 1913.)

The answer of the above named complainants to the answer in the nature of a cross bill, of the defendants, Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin, respectively represents to the court:

1st. The complainant admits the allegations contained in Paragraph A of said cross bill.

2nd. The complainant denies upon information and
41 belief, the allegations contained in Paragraph B of said cross bill relative to the inability of said Michael Donohue to pay the said Benjamin Vosper for his said services and expenses, but, on the contrary alleges that the said Michael Donohue did pay the said Vosper for his said services. Complainant has no information sufficient to form a belief relative to the alleged agreement between the said Vosper and the said Michael Donohue relative to the said Vosper's receiving one-quarter of all that should be recovered in said litigation. Complainant denies upon information and belief that said deed referred to in the said Paragraph B was executed by the said Michael Donohue, but alleges the fact with reference thereto to be as set forth in complainant's bill of complaint. Complainant admits the recording of said instrument, and admits that the said Benjamin Vosper has in his possession a deed which he claims to have been executed by the said Michael Donohue.

3rd. Complainant has no information relative to the matters alleged in Paragraph C of said cross bill sufficient to form a belief.

4th. Complainant admits that the bill of complaint was filed and that the proceedings were had as alleged in Paragraph D of said cross bill, but has no information as to the said proceedings having been started at the solicitation of the said Michael Donohue.

5th. Complainant has no information relative to the matters

alleged in Paragraph E of said cross bill sufficient to form a belief, and therefore leaves defendants to their proof.

6th. Complainant has no information relative to the payment of the moneys to the said Michael Donohue as alleged in Paragraph F but admits the execution and delivery of the deed therein referred to.

7th. Complainant denies the allegations set forth in Para-
42 graph G of said cross bill.

8th. Complainant admits upon information and belief the allegations contained in Paragraph H of said cross bill.

9th. Complainant denies the allegations contained in Paragraph I of said cross bill relative to the said Michael Donohue and this complaint disputing and questioning the title of said defendants to said premises. Complainant admits the execution of the lease and contract referred to in the said Paragraph I, and that the said Mining Company is in possession thereof.

Complainant therefore prays that the cross bill of the said defendants be dismissed, and that he may recover against the defendants his reasonable costs and charges.

MARTIN E. DONOHUE,
By A. H. RYALL, *His Solicitor.*

A. H. RYALL,
Solicitor for Complainant.

Business address—Escanaba, Michigan.

Stipulation Relative to Rights of defendant Buffalo Iron Mining Company.

(Filed March 27, 1914.)

It is hereby stipulated between the complainant and the defendant Buffalo Iron Mining Company, by their respective solicitors, that the rights of said defendant Buffalo Iron Mining Company under its mining lease covering the west half of the northwest
43 quarter (W. ½ of N. W. ¼) and the northwest quarter of the southwest quarter (N. W. ¼ of S. W. ¼) of section twenty three (23) township forty three (43) north, range thirty five (35) west, Iron County, Michigan shall remain unaffected and unimpaired by any decree entered in the above entitled suit, and that if it be decreed that said complainant is the owner of a larger interest in the above described lands than is alleged to belong to said complainant in and by the terms of the said mining lease, then and in such event, such additional interest in said above described land decreed to belong to said complainant, shall be covered by and included under the terms of said mining lease as well as, and to the same effect, as though said additional interest had been originally included under the said terms of said mining lease.

It is further hereby stipulated between said parties that the default of said defendant Buffalo Iron Mining Company, may be entered in the above entitled cause because of its default in not filing

an answer to the bill of complaint filed in this cause, a copy of which was duly served upon said defendant, and that the bill of complaint may be taken as confessed as against it, but that the complainant will serve upon the solicitor for said Buffalo Iron Mining Company, a copy of all pleadings filed by complainant and of all orders and decree entered in said cause.

It is further hereby stipulated that said cause may be brought on for hearing at any time without further notice to said defendant mining company, but nothing herein contained shall in any wise affect any of the matters in dispute in this cause between the
44 complainant and the other defendants above named.

Dated March 20, 1914.

——— ———,
Solicitor for Complainant.

M. S. McDONOUGH,
Solicitor for Defendant Buffalo Iron Mining Co.

Opinion of the Court.

(Filed November 9, 1914.)

This is a bill to quiet the title in the complainant to an undivided quarter of the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-three, in township forty-three north of range thirty-five west, which is claimed by the defendants Vosper, Abbott and Tonkin. For their answer the defendants, except the mining company claimed the benefit of a cross bill, praying that their title to the lands may be quieted against the complainant.

The case was heard upon the pleadings and proofs taken in open court, from which it appears that one Michael Donohue, a brother of the complainant, on and before the 29th day of December, 1894, claimed ownership of the lands in question, under the preemption laws of the United States. On that day, according to the claim of the defendant Vosper, which is denied by Michael Donohue, the latter made, executed and delivered to Vosper, a warranty deed of an undivided quarter of the land.

45 The preemption claim of Michael Donohue was contested by the Lake Superior Ship Canal, Railway and Iron Company, to which company the lands had been certified under a grant to the state to aid in the construction of the Portage Lake and Lake Superior Ship Canal, and, in December, 1890, the United States commenced a suit in equity against the Canal Company and certain other corporations claiming under it, at the instigation and for the benefit of Michael Donohue and a number of other preemption and homestead claimants, seeking to have the certification of the lands to the Canal Company, declared void. The Canal Company appeared and answered in that suit and, with the object of quieting its title, filed a cross bill against the United States, Michael Donahue and a number of other preemption and homestead claimants, and

against the defendant Vosper, whose deed from Michael Donohue had been placed on record.

On the 17th day of November, 1896, the Federal Court at Grand Rapids, Michigan, reciting that the United States, Donohue and Vosper had acknowledged in open court, that, at the time of the commencement of the suit, the Canal Company was and at the date of the decree the Keweenaw Association, (Limited,) (which, during the pendency of the suit, had succeeded to the title of the Canal Company) was, the lawful owner in fee of the lands and that neither the United States, Donohue or Vosper, were entitled thereto, or to any interest therein, adjudged and decreed that the title to the land, at the time of the commencement of the suit, was fully and completely vested in the Canal Company and had since the commencement of the suit become, and then was, fully and completely vested in the Keweenaw Association, (Limited,) and that neither the United States nor Donohue nor Vosper, had any right, title or interest
46 therein, and that the title of the Keweenaw Association be forever quieted as against the United States, Donohue and Vosper. Then follows in the decree this provision:

"This decree shall stand and operate as a release and conveyance from the United States and each and every of the other of said defendants (which included Donohue and Vosper) of all right and title to said lands, and may be recorded as such in the records of the proper county."

Following the entry of the decree and on or about the 19th day of November, 1896, the Keweenaw Association conveyed the land by deed of quit-claim, to Michael Donohue, who, on the 3rd day of December, 1896, executed and delivered a quit-claim deed thereof to the complainant. On the 13th day of August, 1913, another deed of the land from Michael Donohue to the complainant, was executed and delivered.

April 3rd, 1903, the defendant Vosper quit-claimed an undivided one-eighth to the defendant Abbott.

December 18th, 1908, the complainant joined with the defendants Vosper and Abbott in the execution and delivery of an option for a mining lease of the premises. After the giving of the option and on or about February 2nd, 1909, the defendant Abbott quit-claimed an undivided one-thirty-second interest in the mineral to the defendant Tonkin and, on the 7th day of March, 1910, the complainant joined with the defendants Vosper, Abbott and Tonkin, in the execution and delivery of a mining lease of the premises pursuant to the option. The mining lease, which was for a term of thirty years was issued to the Niagara Iron Mining Company as lessee and was, by that company, assigned to the defendant, the Buffalo Iron Mining Company. From the date of the lease until the
47 assignment thereof to the defendant Mining Company, the Niagara Iron Mining Company was, and from that time forward, the defendant Mining Company has been, and is now, in possession of the premises, for mining purposes.

A second decree was entered by the Federal Court, in the suit above referred to, on the 19th day of April, 1905, in which the lands

in controversy here, together with a long list of other lands, are described, and Donohue and Vosper are mentioned among a number of other defendants. It will not, however, be necessary to set forth the particulars of that decree or to discuss its effect since it is conceeded by all parties that the deed of disclaimer and quit-claim, subsequently executed and delivered by the Keweenaw Land Association to the various parties claiming under Michael Donohue, left the parties to this suit, in the same position, respecting the ownership of the quarter interest in question, as before the entry of the second decree. Nor will it be necessary to discuss the effect of the deed from Michael Donohue to the complainant, of August 13, 1913, since the title to the interest in controversy is now claimed by the complainant under the quit-claim deed to him of December 3, 1896.

The complainant claims:

First. That Michael Donohue did not sign, acknowledge or deliver the warranty deed of December 24th, 1894, to the defendant Vosper.

Second. That if Michael Donohue did in fact execute and deliver the deed, it was void, because, made before his rights under his preemption claim had ripened into title.

Third. That the rights of Vosper, if any be had, under the deed from Donohue, became vested in the Keweenaw Association, by the decree of the Federal Court, of November 19th, 1896, and

48 Fourth. That the complainant has acquired the title by the adverse possession of himself and of his grantor, Michael.

The only material question of fact in dispute is whether the warranty deed of December 29th, 1894, purporting to have been executed by Michael Donohue, was executed and delivered by him to the defendant, Vosper.

That Michael Donohue, with full knowledge of what he was doing and with the intention to convey as in the instrument set forth, signed, acknowledged and delivered to the defendant Vosper the warranty deed of December 29th, 1894, is well established by the proofs, and that the consideration which he received therefor, was valuable and adequate, is equally well established. It is clear but that for the effort and money expended by Vosper, which represented the consideration for the deed, neither Michael or Martin would have acquired any interest in the lands.

Whether the deed from Michael to Vosper would have been void because made while the title to the land, although claimed by Donohue under the preemption laws, was in the United States we need not inquire since the decree of the Federal Court settled the fact that the title was not in the United States, and was in the Canal Company.

The deed from Michael Donohue to Vosper containing full covenants of warranty, the defendants claim that the conveyance from the Keweenaw Association to Donohue inured to Vosper's benefit to the extent of an undivided quarter interest. The complainant admits, in effect, that such would be the situation but for the provision in the decree of the Federal Court, that the same should stand and operate as a release and conveyance from the United States, Donohue and Vosper, to the Keweenaw Association, of "all

49 right and title to said lands." The parties not only acknowledge but the decree settled clearly and absolutely that neither

Donohue or Vosper then had or ever had any right or title to the land, in whole or in part, and the provision for a release and conveyance of that, which it was known and adjudicated neither Donohue or Vosper had, was mere surplusage and ineffective for any purpose.

The decree does not purport to have and in fact, did not settle any disputes between Michael Donohue and Vosper but only disputes between the Keweenaw Association on the one hand and Donohue and Vosper on the other. Giving to the "release and conveyance" clause of the decree the full effect claimed for it, and whether it operated to transfer to the Keweenaw Association Vosper's rights under the Donohue deed, must turn on the answer we make to the question whether Vosper's rights at the time the decree was entered, amounted to a right or title to an undivided part of the land, which is the complainant's position, or only to a right of action against Donohue for his breach of warranty of title, and the right to have Donohue's title, should he at any time thereafter, acquire it, inure to Vosper's benefit, which is the defendant's position.

Respecting the nature of Donohue's rights to the land, in whole or in part, at the date of the deed to Vosper, or before the entry of the decree, we may not go behind the decree to inquire. The decree and proceedings in the Federal Court settles absolutely, that Donohue did not own the land, in whole or in part, and that one who does not own any right or title to land cannot, by the execution of a warranty deed thereof, pass any right or title therein to another, is too plain to admit of argument. The right which accrued to Vosper under the breach of the covenants of warranty found in the Donohue deed, was a mere right of action for
50 damages for the breach, up to the time that Donohue acquired title under the deed to him from the Keweenaw Association, which right of action no one claims was transfered to the Keweenaw Association by operation of the decree.

It is true as claimed by the complainant that, in certain circumstances a tenant in common many acquire the title of his co-tenant by adverse possession, but cannot do so by merely taking possession or remaining in possession, and making only such use of the premises as a tenant in common has a right to make. In order to make such possession adverse it not only must be under claim of title to the whole but such claim of title must be brought home to the co-tenant. The doctrine which sanctions the divestiture of the title of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof. Yelverton vs. Steele, 49 Mich., 638. "Clearness and distinctness are requisite to acquire title by adverse possession, either in whole or in part, and especially is this so as against tenants in common. The possession of one tenant in common, unless under a claim of exclusive right, will not affect the rights of the co-tenants. Such exclusive claim and denial of their rights should be clear and unambiguous and brought home to the knowledge of the co-tenants either by express notice or by implication. And if the latter, all doubt growing out of the nature and

character thereof, should be against an outsider. The presumption should be that the tenant in possession respects and recognizes the rights of his co-tenant, until the contrary clearly appears; that the possession is rightful, and not to the exclusion of others having equal rights." "Compan vs. Compan, 44 Mich., 31. It is necessary
51 that the tenant in common should have notice that his co-tenant is asserting a hostile claim of title to the whole estate. It is not sufficient that the one tenant should be in actual possession and doing these things which might seem to others proper to be done by one owning the entire estate. In the absence of express notice of a hostile claim of title to the whole estate, the possession of the co-tenant, to be adverse, must be accompanied by tortions and disloyal acts, which must be open, continued and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the co-tenant. Rich vs. Victoria Copper Mining Co., 147 Fed., 380."

Michael Donohue entered on the land under color of his preemption claim in the year 1883 and continued in actual occupation thereof until he quit claimed to complainant in December, 1896. The complainant was then living on the land with his brother and, upon receiving his deed he continued in possession until the execution of the mining lease, living upon and farming a portion of the land. Since the execution of the mining lease, the complainant has resided upon and farmed a portion of the land, being permitted so to do by the terms of the mining lease, so long as his occupancy does not interfere with mining operations. During all those years, the land was commonly known and spoken of in the neighborhood as the Donohue place. All taxes levied on the premises following the delivery of the Keweenaw Association deed to Michael, until the execution of the mining lease, was paid by the complainant. The taxes levied since the execution of the mining lease have been paid by the lessee, as provided by the terms of the lease.

The Vosper deed was recorded in the office of the register of deeds of Iron county, April 23rd, 1895, but, by error of the register, the
52 date of the deed appears on the record as December 29th, 1895, and the date of the certificate of acknowledgement on April 29th, 1895, instead of the true date of deed and certificate, which was December 29th, 1894. It does not appear that the complainant had actual knowledge of the execution of the Vosper deed until shortly before the execution of the option for the mining lease which was in December, 1908. Upon learning of the Vosper deed the complainant wrote Michael regarding it, who replied denying its execution. Thereupon the complainant caused investigation to be made of the question whether Michael had in fact executed the deed. To aid in such investigation, the original deed bearing Michael's signature, was exhibited to the complainant and his lawyers, by the defendants. At the conclusion of such investigation, and without making any further claim to the quarter interest now in dispute, the complainant joined with Vosper and Abbott in the execution of the option. In a form of lease attached to and made a part of the option, it was expressly stated that Vosper was

the owner of an undivided one-eighth and Abbott the owner of an undivided one-eighth of the land. On the 7th day of March, 1910, the complainant joined with the defendants Vosper, Abbott and Tonkin, in the execution of the mining lease in which it was again expressly stated that Vosper was the owner of an undivided one-eighth of the land, that Abbott was the owner of an undivided three-thirty-seconds thereof, and that Tonkin was the owner of an undivided one-thirty-second for the minerals therein, and the lease further expressly provided for the payment to them, respectively, of one-eighth, three-thirty-seconds, and one-thirty-second of the royalties to accrue thereunder.

We may not, of course, begin the count of the statute before Vosper acquired title, which was on the 19th day of No-
53 vember, 1896. He was then, for the first time, in a position to attack, by an appropriate proceeding in the courts, anyone disputing his title. But, was it held otherwise and that Vosper was in a position to sue to maintain his title, upon receiving his deed from Michael, it would be idle to contend that while Vosper was busy, day and night, moving the executive officers of the United States, Congress and the courts, in an effort to establish Donohue's preemption claim to the land, that Donohue, with full knowledge of what Vosper was endeavoring to do in their joint behalf, and of what Vosper's success or failure meant to both of them, was, nevertheless, holding adversely to Vosper with the latter's knowledge, actual or by implication. To hold, under the proofs in this case, that during the period, from the execution of the deed to Vosper to the delivery of the Keweenaw Association deed to Michael, the latter was holding adversely to Vosper or that Vosper knew, or believed, or had the slighest reason to suspect that Donohue repudiated his rights under the deed, would be absurd. From the date of the Vosper deed to the conveyance to the complainant in December, 1896, the things done on the land by Michael, and from the date of the conveyance to him until shortly before the execution of the option for the mining lease, the things done on and concerning the land by the complainant, were as consistent with full recognition of the Vosper title as the contrary. These lands are located near Iron River in Iron county, while Vosper, before and at the time of the execution of the deed to him, resided, and has ever since resided, at Ionia, Michigan. Until shortly before the execution of the option in December 1908, notice, actual or by implication, that the quarter interest in controversy, was claimed by either Michael or the complainant, was not brought home to him. The statute
54 began to run against Vosper for the first time, when he was notified of the complainant's claim to the entire interest, upon the ground that the deed from Michael to Vosper was a forgery and it stopped running, when, soon thereafter, the complainant either, and it makes no difference which, abandoned his claim to the entire interest, or led Vosper and those claiming under him to believe he had abandoned such claim, by joining with them in the execution of the option and lease, which expressly recognized the ownership of the defendants and their right to have and receive

that portion of the royalties accruing under the lease applicable to the interest owned by them.

Even had the statute began to run against Vosper November 19th, 1896, its running was arrested by the action of the complainant in joining with the defendants in the execution of the option, when Vosper had almost three years, and in the execution of the mining lease, when he had about one year and eight months, within which to bring his action. Houligan vs. Fogarty, 163 Mich., 492, is cited to the contrary. The lease in that case as in this set forth the respective undivided interests of the various lessors in the premises leased. It was there claimed that such recitals or admissions operated to estop certain of the lessors from claiming certain interests in the fee, stated in the lease to be in *othe* of the lessors, and it was held that the lease did not constitute an agreement between the lessors, but only between the lessors collectively and the lessee, and that, therefore, the facts recited or admitted in the lease, did not operate to estop one set of lessors from claiming the title asserted by the express language of the lease to be in another set of lessors. The effect of a such recital, or admission of title, on the running of the statute, was not involved or decided in that case. That
55 the true owner, knowing his title was disputed; that the foundation of such dispute was investigated by the adverse claimant; that after such investigation the claimant signed and acknowledged an instrument in which the title of the true owner was recognized, and later, and after the lapse of over a year, signed and acknowledged another instrument, in which his title was again recognized, would not, reasonably, be led to the conviction that such adverse claim was abandoned, will hardly be denied by anyone, and it would be unconscionable to hold that, without interruption of the running of the statute, an adverse claimant may conduct himself so as to allay all suspicion of the true owner at a time when the courts are yet open to him to protect his title.

A decree will be entered dismissing the bill of complaint and quieting the title of the defendants Vosper, Abbott and Tonkin, as prayed in the cross bill. The defendants will recover their costs to be taxed.

RICHARD C. FLANNIGAN,
Circuit Judge.

Decree.

Filed November 27, 1914.

STATE OF MICHIGAN:

In the Circuit Court for the County of Iron. In Chancery.

At a Session of Said Court, Held at the Court-house, in the City of Crystal Falls, in Said County, on the 30th Day of September, A. D. 1914.

Present: Honorable Richard C. Flannigan, Circuit Judge.

In the cause entitled:

MARTIN DONOHUE, Complainant,
vs.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN AND THE BUFFALO IRON MINING COMPANY, Defendants.

This cause having heretofore been brought on for hearing before the court, on the pleadings and upon proofs taken in open court, and having been argued by counsel for the respective parties and submitted to the court, and by the court taken into consideration:

And the court having duly considered the said pleadings, testimony, and other evidence offered, and the arguments of counsel, now finds as follows:

1. That Michael Donohue, the grantor of the complainant, Martin Donohue, on the 29th day of December, 1894, claiming to be the owner of the lands described in the complainant's bill, and hereinafter described, executed and delivered to the defendant, Benjamin Vosper, a deed with full covenants of warranty, purporting to convey to the said Benjamin Vosper the undivided one-fourth thereof, upon a sufficient and valuable consideration moving from said Benjamin Vosper to said Michael Donohue.

2. That the said Michael Donohue at the time of the execution of the said warranty deed was not the owner of said lands, nor of any interest therein, but that the Keweenaw Association, (Limited,) a partnership association formed under the laws of the state of Michigan, and having its principal office at the city of Marquette, in said state, was at that time the owner in fee simple of said lands.

3. That afterwards, on the 19th day of November, 1896, the said Keweenaw Association, (Limited,) by good and sufficient deed, duly executed and acknowledged, conveyed the said lands to the said Michael Donohue, which conveyance, by virtue of the warranty deed from said Michael Donohue to said Benjamin Vosper, inured to the benefit of said Benjamin Vosper as to the undivided one-fourth interest in said lands.

4. That on the 3rd day of December, 1896, the said Michael Donohue executed a quit-claim deed, purporting to convey to the complainant, Martin Donohue, the entire of said lands, which, by reason of the above mentioned warranty deed of said Michael Donohue to said Benjamin Vosper, operated to convey to said Martin Donohue only the undivided three-fourths interest in said lands.

5. That on or about the 3rd day of April, 1908, the said Benjamin Vosper conveyed by deed to the said Fred H. Abbott an undivided one-eighth interest in said lands, and on or about the 2nd day of February, 1909, said Fred H. Abbott, by deed conveyed to the defendant, Maurice J. Tonkin, the undivided one thirty-second of all ores and minerals in said lands, together with the right to explore for, dig, mine and remove the same without compensation to said Fred H. Abbott for the reasonable use of the surface of said lands for that purpose.

6. That on or about the 7th day of March, 1910, the said Martin Donohue, together with certain other persons to whom he had conveyed undivided interests therein, together with the defendants, Benjamin Vosper, Fred H. Abbott and Maurice T. Tonkin, executed a lease for mining purposes, for the term of thirty years from the date thereof, to the Niagara Iron Mining Company, a corporation formed under the laws of this state, which lease was subsequently, and prior to the commencement of this suit, assigned by said Niagara Iron Mining Company to the defendant, the
58 Buffalo Iron Mining Company, as set forth in the bill of complaint in this cause.

Therefore it is by the court now here ordered, adjudged and decreed, as follows:

(*a*) That the bill of complaint of the said complainant filed in this cause be and the same is hereby dismissed.

(*b*) The said defendants Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin having, in and by their answer, claimed the benefit of a cross bill, praying that it be decreed by this court that they are the owners in fee simple of the undivided one-fourth of said lands, and that their title thereto be quieted by decree of this court and against the said complainant, and all persons claiming under him,

It is further adjudged and decreed that the said defendants, Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin are the owners in fee simple of the undivided one-fourth of the lands described in said bill of complaint, that is to say, the said Benjamin Vosper is the owner of the undivided one-eighth thereof. The said Fred H. Abbott is the owner of the undivided one-eighth thereof, except the undivided one thirty-second of all ores and minerals thereon or therein; and the said Maurice J. Tonkin is the owner of the undivided one thirty-second of all ores and minerals thereon or therein, together with the right to explore for, dig, mine and remove the same, without compensation to his grantor, the said Fred H. Abbott, for the reasonable use of the surface of said land for said purpose, subject to the above mentioned lease, and that the title of the said defendants, Benjamin Vosper, Fred H. Abbott and

Maurice J. Tonkin to the said undivided one-fourth interest in said lands, in the proportions above mentioned, be and the same is hereby forever quieted as against all claims of the said complainant, Martin Donohue and all persons claiming through or under him.

(*c*) That the said Martin Donohue do execute and deliver to said Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin a conveyance and release, by proper deed duly executed and acknowledged, of all right, claim and demand to and interest in the
59 undivided one-fourth interest in said premises, in the proportions above set forth, and that in default thereof, or until such deed of release or conveyance be given this decree may be recorded in the office of the register of deeds of said county of Iron and shall operate as such release and conveyance.

(*d*) That the said complainant do pay to the said defendants, Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin their costs by them about their defense in this behalf expended, to be taxed, and that the said defendants have execution therefor.

The lands described in the bill of complaint, title to the undivided one-fourth of which is hereby declared to be in the said defendants Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin, are situated in the County of Iron and State of Michigan and are described as follows, to-wit:

The west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (23), in township forty-three (43) north, of range thirty-five (35) west.

RICHARD C. FLANNIGAN,
Circuit Judge.

Countersigned, filed and entered this 27th day of November, A. D. 1914.

JOHN WALL, *Register.*

Transcript of Testimony.

At a Session of Said Court Held in the Court House in the City of Crystal Falls, on the 26th Day of June,
60 1914.

Present the Hon. Richard C. Flannigan, Circuit Judge.

This cause came on to be heard upon the examination of witnesses in open court, as in a suit at law, and thereupon the complainant appeared by A. H. Ryall, his solicitor, and the defendants, Fred H. Abbott, Benjamin Vosper and Maurice J. Tonkin, by D. H. Ball, their solicitor, and thereupon the following proceedings were had. Counsel for the several parties called as witnesses those who are hereinafter designated as witnesses for the respective parties.

The deposition of MICHAEL DONOHUE, taken by stipulation between the parties before the Hon. Richard C. Flannigan, at Marquette, on April 14th, 1914, was read in evidence.

Direct examination.

By Mr. Ryall:

I live at Quincy, Washington, and am 44 years of age. I was born in Manitowoc county, Wisconsin, and lived there about 14 years. From there I moved into Michigan, first at Menominee, and did not live there very long. I then went up into the lumber woods. I can't say just what year I moved to the vicinity of Iron River, but it was about 34 years ago. That would be about 1880. I was living in that vicinity in 1882. I entered a pre-emption claim in that year, and took out 160 acres, consisting of the W. ½ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼ of Sec. 23, and the S. W. ¼ of the S. W. ¼ of Sec. 14-43-35 West. I began immediately to live on these lands. I built a cabin and started living there. There was too much snow to do any clearing. I continued to live on there as my home until I finally left for the west. I was not married at that time, and was not married at any time prior to my living in Michigan or leaving Michigan.

61 During those two years I was by trade a cook and worked in the camps around Iron River. I made this house on these lands my home during all the time.

All of this testimony was objected to by the defendants' counsel as immaterial and irrelevant.

The house when I lived there was located on the second forty going north on Section 23, and is the same forty that the present house is on on these lands. It is not the same house. It is a little smaller. It was made of logs, and I lived there except when I was away working.

I remember what I was doing during the fall of 1894. I was cooking for a man named Piper on the Brule River. He was a lumbering man, and was putting in spruce for pulpwood. I can't say just who he sold to, but he was jobbing for Andrew Young. His camps were about 12 miles nearly straight west of Iron River, and I was working there as a cook. I had no one helping me as an assistant. I went up there to work in the fall of 1894.

I was down to Iron River during the month of December, 1894. I came down on the 24th to spend Christmas, and I went back on the 26th. I had not been down before that fall, and I went back to the same camp on the 26th, and continued to work there. The next time I came down was the first part of March. I was not away from camp down to Iron River or Crystal Falls or any other village, or down in that vicinity from the time I went back December 26th, until I came down on or about the first of March. I was working continuously at the camp at that time as cook.

I came down in March to make a settlement with the Canal Company and came to Marquette.

I found out the exact day that I came to Marquette this evening.

I have been to the land office, and examined the book there
62 marked Record E, and that shows that a hearing was had here on March 5th, 1895, and that fixes the date I came to Marquette. I had not been away at all from the camp where I was cooking between December 27th, 1894, and the time I came to Iron River to come here (Marquette) on March 5th, 1895. I could not say how many days it was prior to March 5th, that I came to Iron River. I should judge a couple of days.

I had been working for Mr. Piper all this time. His first name is James. My brother Martin, was working at the same camp as a foreman. He went up in the fall at the same time I did. He came down at Christmas with me, and went back with me.

During that time I was in the habit of drinking. I drank quite a little at times. I was what might be called a heavy drinker at that time. I drank to excess and became drunk frequently. I am pretty sure that I drank liquor so that I was under its influence at the time I was down at Christmas, 1894.

I believe I stopped at the Boyington house at Iron River. They kept a register in those days. Andy Boyington was running the Boyington house. I am sure I stayed there one night any way during the two or three days that I was down. It was the night before Christmas. I could not say whether I registered or not. I could not say for sure because I had been staying there right along frequently whenever I came down.

I kept furniture out at this house on the land in question. There were chairs, stoves and a bed and all other requirements for a bachelor. This land is a couple of miles from Iron River. I always went down there when I came down for a day or two. I don't think I went out there during this Christmas.

I remember the occasion of selling this land to my brother Martin.
The deed is dated December 3rd, 1896, and I remember the
63 occasion of executing it. It was executed in Lawyer Flewellings' office in Crystal Falls. It is a deed of the whole interest in this land. I thought at the time that I deeded this to Martin that I owned the entire land.

This was objected to as immaterial and irrelevant.

I had no recollection or knowledge of my having ever parted with any interest in these premises at that time.

This was objected to as irrelevant and immaterial. I had never said anything to Martin to the effect that I had sold any part of this land.

This was objected to as irrelevant and immaterial.

I think that I was on this place during the time from March 1895 to December 1896. I left Iron River in 1896.

In the winter of 1895 and 1896, I took a contract from Pat Kelly to put in spruce timber at Elmwood. Martin was up there with me. In December, 1896, I sold to Martin, and then went to see my folks in Wisconsin. I stayed there until after New Years. Then I went to the State of Washington. In March following I left there and went to Dawson City, Alaska, and I was in Alaska until nine years ago, (1905.) I came out to Seattle from there

three times, and for the last nine years I have been on a farm near Quincy, Washington, and am still on the same farm.

I married about eight years ago. My wife is now in the Insane Asylum and has been for a little over five years.

After I sold to Martin, and in 1906 or 1907, I received a letter from Martin in regard to a claim of somebody owning an interest in these lands thru a deed that I had given. I can't remember what year that was. I read these letters, but I did not bother with them. I have not the letters now. They are all destroyed.

64 I wrote back to Martin telling him I did not sign a deed to anybody. That is the reply I made to the first letter in regard to it.

This was objected to as incompetent and irrelevant, and as not the best evidence.

I destroyed the letters I received from Martin, but replied to them.

Complainant then offered in evidence Page 140 of Book E of the United States Land Office. Proof — the genuineness of the book was waived, but counsel for defendant reserved the right to make any further objections he desired to the introduction of the contents of this book. This page read as follows:

"MICHAEL DONOHUE
vs.
"L. S. S. C., Ry. & I. Co.

"Involving the W. ½ of the N. W. ¼ and the N. W. ¼ of S. W. ¼ 23, T. 44 N. R. 35 W.

"In the matter of the Application of MICHAEL DONOHUE, Seeking for Confirmation of Title to the W. ½ of the N. W. ¼, and the N. W. ¼ of the S. W. ¼ 23, Town. 43, Range 35 West, under Act of Congress approved March 2, 1889.

"January	7, 1895.	Affidavit asking for hearing to prove title under said act."
Jan.	8, 1895.	Notice issued citing February 25, 1895, be for R. & R. at this office.
Feb.	25, 1895.	Hearing adjourned until March 5th.
Mar.	5, 1895.	D. H. Ball files objections to the jurisdiction of R. & R. Objections overruled and cause heard.
Mar.	5, 1895.	Hearing had and testimony taken. Appearance: Benj. Vosper, attorney for Michael
65		Donohue. D. H. Ball, attorney for L. S. S. C. Ry. & I. Co.
Mar.	9, 1895.	Decision rendered in favor of Donohue.
Mar.	23, 1895.	Appeal filed by Ball.
April	30, 1895.	All papers transmitted to Commissioner.
April	24, 1902.	Contest dismissed. (See Commissioner's letter F. of this date.)
May	2, 1902.	Notified Benj. Vosper, attorney for plaintiff at Ionia, Mich."

Witness was shown deed of December 29th, 1894, purporting to run from the said witness as grantor, to Benjamin Vosper, conveying a one-quarter interest in the land in question, the possession of which said deed was retained by counsel for the defendant, and with reference thereto the witness testified as follows:

Q. You have read this deed all over?
A. Yes.
Q. You looked at this signature?
A. Yes sir.
Q. Is it your signature?
A. Why, it resembles it very much.
Q. Would you say that it is?
A. No. I couldn't.
Q. Could you say that it is not?
A. I couldn't. I don't think it is mine, although it resembles it.
Q. Have you any recollection of signing this, or any such conveyance, to Mr. Vosper, of any interest in the land?
A. Nothing at all. I never remember signing any paper to Mr. Vosper.
Q. Do you remember signing any paper in the presence of M. J. Mitchell and P. O'Brien?
A. No sir.
66 Q. Do you know M. J. Mitchell?
A. Yes sir.
Q. Who was he?
A. He was a man that had a right on some Canal lands.
Q. He was another man who had settled on some of the lands?
A. Yes sir.
Q. Did you ever give him any money to help litigate these land questions?

Mr. Ball: I object to that as incompetent and irrelevant.

Q. How much did you give him?
A. There was one time I gave him $25.
Q. Do you remember giving him any other money?
A. One time $10 and one time $5, is all I can remember, because I came from the camps at any time.
Q. Was this matter in litigation for a number of years?
A. It has been since 1882, since I first went on there.
Q. And Mr. Mitchell was the man that collected the money from the homesteaders?
A. He was the man that collected it; I don't know what he did with it, whether Mr. Vosper got the benefit of it or not, I don't know.
—. ——.
A. I gave him, quite a number of times, money.

Mr. Ryall:

Q. Who did he say he was collecting money for.
A. He collected it for Mr. Vosper.

Mr. Ball: I object to that for the same reason.

Mr. Ryall:

Q. And he got it for the purpose of paying it to Mr. Vosper in this connection?

A. Yes sir.

67 Mr. Ball: I make the same objection right there, to all this.

Q. Is Mr. Mitchell still alive?
A. No sir.
Q. Do you know P. O'Brien?
A. Yes sir.
Q. That is Mr. P. O'Brien of Iron River, isn't it?
A. Yes sir.
Q. The editor of one of the papers there?
A. Yes sir.
Q. Do you ever remember acknowledging any papers before him as notary public?
A. No sir.
Q. Or signing any paper before him?
A. No sir.
Q. This is the 29th day of December, 1894. Do you know where you were on that day?
A. I was in the camp.
Q. You know that, because of what you have told us here about the circumstances?
A. Yes sir.
Q. Was Mr. O'Brien ever at the camp?
A. Not that I ever knew.
Q. I mean at Piper's camp, while you were working there?
A. No sir.
Q. Do you remember of Mr. Mitchell being out there.
A. No sir.
Q. Do you remember signing any papers out there of any kind?
A. No sir.
Q. Have you any recollection of signing any paper of any kind when you were down at that Christmas time?

68 A. No sir. I have not.

Mr. Ryall: I offer that deed in evidence. Said deed being the deed which was shown to the witness, and concerning which he testified, was received in evidence, marked "Exhibit A, 4|4|'14" and was as follows:

"This indenture, made this 29th day of December, in the year of our Lord one thousand eight hundred and ninety-four, between Michael Donohue of Iron county, of the first part, and Benjamin Vosper of City of Ionia, same state, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one *one* dollar and services, rendered and to be rendered, *dollars*, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, does by these

presents grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part, and his heirs and assigns, forever, all those certain pieces or parcels of land situate and being in the County of Iron and State of Michigan, and described as follows, to-wit:

The equal undivided one-quarter of the west half of the northwest quarter and the northwest quarter of the southwest quarter of Section No. twenty-three (23), in Town No. 43 North, of Range 35 west; said first party also hereby assigns to said second party a like share and interest in and to any and all damages to which he may be entitled by reason of the cutting or removing any timber from said premises;

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining: to have and to hold the said premises as described, with the appurtenances, unto said party of the second part, his heirs and assigns, forever. And the said party of the first part, his heirs, executors and ad-
69 ministrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the above granted premises in fee simple; that they are free from all encumbrances whatever and that he will, and his heirs, executors, administrators shall warrant and defend the same against all lawful claims whatsoever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

MICHAEL DONOHUE. [L. S.]

Signed and delivered in presence of
M. J. MITCHELL.
P. O'BRIEN.

STATE OF MICHIGAN,
County of Iron, ss:

On this 29th day of December in the year one thousand eight hundred and ninety-four before me, a Notary Public in and for said county, personally appeared Michael Donohue, to me known to be the same person described in and who executed the within instrument, who acknowledged the same to be his free act and deed.

[NOTARY SEAL.] PATRICK O'BRIEN,
Notary Public, Iron County.

REGISTER'S OFFICE,
Iron County, ss:

This instrument was presented and received for record this 23rd day of April, 1895, as the proper certificate was furnished in compliance with Section 135, Act 206, Laws of 1893.

Recorded the 23rd day of April, A. D., 1895, at 2 o'clock P. M. in Liber P of Deeds on Page 275.

_____,
Register of Deeds.

70 Mr. Ball: Of course wo do not want to leave it. It can be identified.

Mr. Ryall: I call attention to the fact that on the register's certificate, it is not signed by the register.

Cross-examination.

By Mr. Ball:

There was no law suits going on at the time I settled on this land in 1882, but the Canal cruisers tried to drive me off the place I had litigation over. I did not drive. There was a suit finally brought against me in the United States Court, and I believe there was a judgment entered against me by default. I never employed Mr. Vosper in the world. I understood that he was defending my cause in the United States Court, but so far as employing him, I never did. I could not say when I first saw him, but he came to Iron River. I knew there was a judgment against me, and that I was liable to be put off the premises, and I believe that Mr. Vosper took hold of the case, and got the judgment set aside, and got a new trial. I knew he was doing that at the time, and I do say that I never employed him. I always refused to sign any papers for anybody, and told him I would not sign anything until I had the actual land in my hand. It was the supposition that he was defending my case. I was up here (Marquette) when the case was tried and a verdict was directed against me in the United States Court by Judge Severens. We were right there and gave in our evidence. That was the time judgment was rendered against me the second time, but I never knew Mr. Vosper pleading in the case for the homesteaders. He was in the court room, but he was not doing anything in the case that I know of. I was there all the time. Don Dickinson
71 and Judge Marston was looking after my case. I did not see Mr. Vosper doing anything in my case, or taking any part. He was outside the rail. He never did anything that I know of. He was not in amongst the lawyers and so far as I could see he had nothing to do with the case. It may be that he took it to the Supreme Court for me, but I do not know. I understand that he finally got the judgment reversed in the Supreme Court, and it was sent back. I did not afterwards come to him to represent me in the land office. I did not go to anybody. I was here before the register and receiver of the land office, and gave my evidence in March, 1895. Don M. Dickinson and Judge Marston was prosecuting my case.

Q. Before the land office just think? Was Don M. Dickinson at the land office trial or Judge Marston either?

A. I was not up here.

Q. Was not Mr. Vosper the only one that represented you at the land office?

A. I was not here.

I only gave one testimony. I was here at the time my case was tried in the United States Court before Judge Severens, and gave my testimony there. I have forgotten what year that was. I believe it was in the spring, but I could not just say exactly just what time it

was. It was in the Supreme Court before that I guess. As near as I can understand it went to the Supreme Court, and was handed down to the lower court again. I remember that I gave my testimony in the court before Judge Severens. I believe I came here after that, and gave my testimony before the land office, and had two witnesses to prove my case before the land office. Mr. Culver or Mr. Vosper represented me, I don't know which. I could not say that
72 Mr. Culver was register of the land office at that time. Mr. Vosper was not here at all. I don't remember that Mr. Vosper was here and put in my proof for me before the land office. He was not here that I know of. At least I had not seen him.

I don't know that I was drinking pretty hard in those days. I can remember that I had a letter from Rush Culver to come to Marquette and settle up the Canal case.

Q. You came to prove your case, didn't you, before the land office?

A. With the Canal Company. I got the deed from the Canal Company, but not at that time. It came afterwards.

I never went to Grand Rapids in my life, and did not go there to get some money and make settlement. At all events, I did not get the deed until 1896, from the Canal Company, just before I gave a deed to my brother Martin.

I was twice here in Marquette, but I have not any recollection of Mr. Vosper having anything to do for me in that case at that time. The last time I was in Marquette was the time I received the thousand dollars from the Canal Company. At least I was supposed to receive a thousand dollars, but all I got was $550. There was a garnishee of $300 and Mr. Culver took $150 for services thru Mr. Vosper.

I could not say just exactly that this was the time I got the deed from the Canal Company. The garnishee was withdrawn. At least they withdrew the garnishee, and sent it back to Iron River, and I was sued and the money laid here in the bank, and Mr. Culver took it out of the bank and put it in his own pocket, and that is the last I seen of it.

I am sure it was in the winter of 1894, and 1895, that
73 I was at work for Mr. Piper at his camp. I began in the fall, but I could not say just what time Piper's camp was about 12 miles up on the Brule River from the Iron River. I came down from there on the 24th, and spent Christmas. It was the day before Christmas. I was over night in Iron River, I am pretty sure of that. I stayed over the 24th and 25th, and went back to Piper's camp on the 26th. We walked back to camp. I know that we went back on the 26th, because we went back the next day after Christmas. I remember something positively as long ago as that, and that I went back the next day after Christmas. I can tell where I was the next day after Christmas in 1895. I was on the bend of the river up to my spruce camp. I am sure I was there between there and Elmwood that day. I was attending to the shipping of cars. I could not tell you where I was on that particular day every year, but I know it was on the 26th, the day after Christmas, the day I went back in this particular year, because I was working for another man, and I had to

be there. I had to be back the day after Christmas. I do not know whether I had entirely recovered from my drinking on the 26th. Maybe I was a little full at the time. I have drank all my life since I was a little boy until six years ago. I could not swear that I probably wrote the signature on Complainant's Exhibit "A." It looks like it and it resembles my writing. I could not say that it is not, and I could not say that it is either. I have seen lots of other men who could write just like that. I do not know as I ever saw a man that wrote that name like that. I have seen lots of writing resembling my writing. I can't say whether ordinarily I would have no hesitancy in saying that this is my signature. I would not say
74 whether I would if I saw it on a piece of paper, and a person showed it to me. I could not generally say that it was.

I was well acquainted with Mr. Mitchell, and I could not say that I recognize his signature. I have never seen his writing enough to tell. I did not hire Don N. Dickinson to look after my case, nor Judge Marston. We offered to pay him, and he said he did not have * * * I never employed him at all, but when he refused pay, we made him a present of a big deer horn. I think Mr. Mitchell had the same sort of a claim that he was prosecuting. I am sure that I never employed counsel, but I expected counsel would be employed. I do not know whether I was giving Mitchell money with which he was authorized to employ Mr. Vosper. I gave money to him, expecting that he was going to pay somebody for attending to my case, and I expected some expenses had got to be paid. Mr. Vosper said he was going to take it to the Courts in Grand Rapids, and he had to have money to fight it. I do not know whether he did that or not. It might be that Don N. Dickinson did, for all I know.

I got a compromise settlement from the Canal Company, and got a certain sum of money supposed to be a thousand dollars, and also a deed from the Canal Company. In the meantime the timber had been cut off the land by the Canal Company, or by the parties to whom they sold it. This thousand dollars was for a compromise between me and the Canal Company for the pine timber, and they gave me back the land and a thousand dollars.

The witness was then shown an appeal bond to the Supreme Court of the United States, and asked if he could tell whether it was his signature on the bond or not, and in reply thereto said that it resembled the same writing and looked like his signature. The
75 witness was also shown another document taken from the office of the United States Court at Grand Rapids, being written authority to Rush Culver to consent to decree, and Michael Donohue was asked if it looked like his signature, and in reply said that it did, but that he could not positively say whether it was or not.

By the Court:

Q. Have you a middle name?
A. M. J.

Mr. Ball: The first document above referred to is the appeal bond from the files of the United States Court at Marquette, given on the

appeal of the case of the Lake Superior Ship Canal Railway & Iron Company against Michael Donohue on appeal from this Court to the United States Supreme Court. The second is taken from the files of the Court in Grand Rapids, being written authority to Rush Culver to consent to the decree. The case was pending there in equity. Both of these exhibits were marked for identification.

Redirect examination.

By Mr. Ryall:

I have no middle name by baptism, but I have adopted the name of Jermiah, as my middle name. He was my godfather, and I took it. My real name is Michael. For years I signed my name with a J.

These two papers that were signed are signed with a J. as a middle initial. The J. is stricken out in the bond. I never had any middle name, I just took that. I sign legal papers Michael Donohue. When I was living on this land, I claimed it as my own all the time.

This answer was objected to as irrelevant and incompetent.

I paid the taxes on it. I think I paid $22.00 the last year's
76 taxes, the Canal Company didn't pay. I paid whatever taxes were assessed against it during that time. I cleared about thirty acres possibly forty, and cultivated it. I claimed at as my own at the time I deeded it to Martin, and also all the time that I was on there. I expected some time to be able to prove up under the homestead law, and get my patent from the government.

This was objected to as incompetent and leading.

Recross-examination.

By Mr. Ball:

I don't mean that after I got the deed from the Canal Company I expected to prove up and get a patent from the Government. I did not get anything out of the homestead. They got the best of it. I paid just one year's taxes $22.00, and that is for the year they deeded to me in 1896.

Complainant's counsel introduced in evidence copies of certain pleadings which had been filed in a cause formerly pending in the Circuit Court of the United States for the Southern Division of the Western District of Michigan, in equity, between the United States as complainant and the Lake Superior Ship Canal, Railway and Iron Company and others as defendants, which were admitted by defendants' counsel to be correct copies of such pleadings. Defendants' counsel objected to said pleadings as incompetent to prove the facts alleged therein, but consented that they might be received merely for the purpose of showing the claims of the parties and what was before the court in that case. Said documents were received in evidenc- and marked as exhibits as follows:

77 EXHIBIT A.

Bill of complaint filed by the United States in the above mentioned cause about the 18th of December, 1890, wherein the United States claimed to be the owner in fee of about 15,000 acres of land, described therein, among which was the land described in the bill of complaint in this cause. It was set forth in said bill of the United States that the lands therein described had been selected and certified to the state of Michigan under a grant made by act of Congress approved July 3, 1866, granting 200,000 acres of land to the state of Michigan to aid in building a harbor and ship canal at Portage lake, Keweenaw point, Lake Superior. It was claimed by the United States in said bill that the selection and certification of said lands under said canal grant was void, for the reason that, as alleged in said bill, said lands had been before that and in the month of December, 1861, certified to the state of Michigan under an act of Congress approved June 3, 1856, granting lands to the state of Michigan to aid in the construction of two certain projected railroads, one from Marquette southward to the Wisconsin state line, and another from Ontonagon southward to the Wisconsin state line, which grants it was alleged in said bill had not been lawfully forfeited or terminated at the time of the selection of said lands under the canal grant aforesaid of July 3, 1866.

It was also alleged that numerous persons had settled upon portions of said land, for the purpose of acquiring the same under the homestead and preemption laws of the United States, both prior to and subsequent to the act of Congress approved March 2, 1889, declaring the said lands forfeited to the United States, and that the United States was desirous of protecting said settlers upon said
78 lands and giving them an opportunity to complete their entries; that the defendants, or some of them, were cutting timber from said lands, under a license from said Lake Superior Ship Canal, Railway & Iron Company, which claimed the same under said canal grant.

And said bill prayed for an injunction to prohibit the cutting of timber and committing of waste on said lands, and for other and further relief.

EXHIBIT F.

The answer of the Lake Superior Ship Canal, Railway and Iron Company and the other defendants, to said bill, filed about the month of February, 1891, setting forth that the said lands had been lawfully surrendered to the United States and freed from any railroad grants theretofore made covering said lands and were, at the time of the selection under said canal grant, public lands of the United States; that the said lands were duly selected by the agent of the State of Michigan under and pursuant to the provisions of the act of Congress of July 3, 1866, granting lands to aid in the construction of said canal, and that said selections were duly certified and

approved by the secretary of the Interior of the United States about the 22nd of May, 1871, and that the canal provided for by said act of July 3, 1866, had been fully completed and accepted by the Governor of the State of Michigan, thereby vesting the title in the canal company; that the defendant, the Lake Superior Ship Canal, Railway & Iron Company was the successor in title to the com-
79 pany which constructed the canal and in which the title had become vested by virtue of the certification of the Governor of the State of Michigan as aforesaid.

Said defendants also claimed that if the certification of said lands under said canal grant was unauthorized, nevertheless the said defendants' title to said lands was confirmed by the act of Congress of March 2, 1889, entitled: "An act to forfeit lands granted to the state of Michigan to aid in the construction of a railroad from Marquette to Ontonagon in said state." And said defendants by said answer denied that any of the persons referred to by the United States in its bill as settlers on said lands were bona fide settlers, or that their application- for said lands were bona fide, or that any of them had made such applications or settlements in good faith.

EXHIBIT H.

A cross bill in the above case, filed by the Lake Superior Ship Canal, Railway & Iron Company, as complainant, at or about the time of filing the answer, against the United States and the Attorney General, setting forth the claim and title of the said Lake Superior Ship Canal, Railway & Iron Company to said lands, including the land involved in this cause, and praying for a decree declaring that said complainant was the absolute owner in law and equity as against the United States of the lands involved in said cause, and for general relief.

80 EXHIBIT G.

The supplemental answer of the defendants in said cause, filed about the month of May, 1895, pursuant to an order of the court allowing the same, setting forth, among other things that since the filing of the original answer and cross bill a large number of persons, naming them, among whom was Michael Donohue, had filed applications in the United States land office and were attempting to proceed to prove their claims as preemptors or homesteaders to certain portions of the lands described in the said bill of the United States.

EXHIBIT I.

Supplemental cross bill, filed about the month of May, 1895, in the aforesaid cause, by leave of the court first obtained, by the Lake Superior Ship Canal, Railway & Iron Company and the Keweenaw Association, (Limited), which last named defendant had been admitted as a defendant in said cause and authorized by order of the

court to join in said supplemental cross bill, setting forth that the persons named in said supplemental answer had been seeking to establish their claims to portions of said land, and describing the land which each of said persons claimed, among whom was named Michael Donohue claiming the lands involved in this suit, and making all said claimants parties to said supplemental cross bill. Said cross bill set forth that the said Keweenaw Association, (Limited,)
had succeeded to all the right, title and interest of said Lake
81 Superior Ship Canal, Railway & Iron Company, and prayed
for a decree declaring, adjudging and decreeing that the lands described in the said bill of complaint of the United States were confirmed to the said Lake Superior Ship Canal, Railway & Iron Company by the act of Congress of March 2, 1889, and that the said Keweenaw Association, (Limited,) was then the absolute owner, in law and equity, as against the United States and as against any of said claimants, including Benjamin Vosper and Michael Donohue of all said lands, and praying for further and general relief.

Exhibit J.

Amended bill of the United States in the same cause, setting forth that the cause had been transferred from the Northern Division of the Western District of Michigan to the Southern Division, but making no other allegations different from those of the original bill material to this cause.

Mr. Ryall: I next offer in evidence the following conveyances: A certified copy of the Governor's certificate from the State of Michigan to the Lake Superior Ship Canal, Railway & Iron Co., dated June 25, 1879. Recorded March 14, 1889, in Liber J of Deeds, page 41 and following. I offer the recorded copy.

Mr. Ball: What is that—a certificate of the completion of the canal?

Mr. Ryall: A copy of the Governor's certificate stating that these lands were selected and certified to the State of Michigan for the company.

82 Mr. Ball: I do not know what it is, but I will preserve an objection to it.

Mr. Ryall: I next offer the record of a deed covering these lands from the Lake Superior Ship Canal, Railway & Iron Company to the Keweenaw Association, (Limited,) dated April 8, 1891. Recorded August 25, 1891, in Liber O of Deeds, Page 237. "By said deed the said Lake Superior Ship Canal, Railway and Iron Company did grant and convey to the said Keweenaw Association, (Limited,) all its lands, including the lands involved in this suit." Next a quit-claim deed from the Keweenaw Association, (Limited,) dated October 31, 1896, and recorded November 30, 1896, in Liber Q of Deeds, Page 347, conveying these lands to Michael Donohue, of Iron River, Mich.

Mr. Ball: The date of acknowledgement is later than that?

Mr. Ryall: Yes, acknowledged November 19, 1896. I offer the record of a copy of the decree in chancery in the case of the United

States vs. Keweenaw Association, (Limited,) et al., dated November 17, 1896. Recorded November 16, 1898, in Liber 4 of Miscellaneous Records, Page 443, that being the same as Exhibit A attached to the answer in the nature of a cross bill of the defendants in this case.

Next, a quit-claim deed from Michael Donohue to Martin Donohue, covering this same property, dated December 3, 1896. Recorded December 3, 1896, in Liber P of Deeds, Page 555, which was received in evidence and marked Complainant's Exhibit "W" and reads as follows:

COMPLAINANT'S EXHIBIT W.

83 This indenture, made the third day of December in the year of our Lord one thousand eight hundred and ninety six, between Michael Donohue, unmarried of Iron River, Iron Co., Michigan, party of the first part, and Martin Donohue of Iron River, Michigan, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, does by these presents, grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns, forever, all that certain pieces or parcels of land, situated in the Township of Iron River in Iron county, and State of Michigan, known and described as follows: The west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (W. ½ of N. W. ¼ & S. W. ¼ of S. W. ¼) of Sec. (23) town forty-three (43) north of range thirty-five (35) west, Iron county, Michigan, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the said Martin Donohue to the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

MICHAEL DONOHUE. [SEAL.]

Signed, Sealed and Delivered in Presence of
A. L. FLEWELLING.
LOTTIE W. FLEWELLING.

STATE OF MICHIGAN,
County of Iron, ss:

84 On this third day of December in the year one thousand eight hundred and ninety-six before me, a Notary Public in and for said county, personally appeared Michael Donohue, an unmarried man, to me known to be the same person described in

and who executed the within instrument, who acknowledged the same to be his free act and deed.

[NOTARIAL SEAL.] ALBERT L. FLEWELLING,
Notary Public, Iron County, Mich.

REGISTER'S OFFICE,
County of Iron, ss:

Received for record the 3rd day of December, A. D. 1896, at 3 o'clock P. M., and recorded in Vol. P of Deeds, on Page 555.

G. E. VOOS,
Register of Deeds.

Mr. Ryall: Also the recorded copy of decree of April 19, 1905, recorded in Liber 7 of Miscellaneous Records, Page 593, in the case of the United States vs. the Keweenaw Association, (Limited,) et al., being the same decree as that attached to the Bill of Complaint herein.

I also offer the recorded copy of a deed from the Keweenaw Association, (Limited,) to Michael Donohue, dated October 2, 1909. Recorded in Liber 16 of Deeds, Page 460, on October 21, 1909.

Mr. Ball: The abstract shows no such deed.

Mr. Ryall: I also offer in connection with this same conveyance a certified copy of this instrument, recorded as stated.

Mr. Ball: It is a release or quit-claim to the grantees of Michael Donohue, and not to Michael Donohue at all.

Said paper was received in evidence marked "Complainant's Exhibit R, and reads as follows, viz:

85 "The Keweenaw Land Ass'n (Ltd.),
to
Michael Donohue et al.

Received for record, Oct. 21, A. D., 1909.

Know all men by these presents, That Whereas, on the seventeenth day of November, in the year one thousand eight hundred ninety-six, The Keweenaw Association, (Limited), a partnership association of the State of Michigan, obtained a decree in the Circuit Court of the United States for the western district of Michigan, in equity, declaring and quieting its title as against the United States and one Michael Donohue to the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-three (23) in township forty-three (43) north, range thirty-five (35) west, in the County of Iron and State of Michigan.

And whereas by quit claim deed dated the thirty-first day of October in the year one thousand eight hundred ninety-six, but acknowledged and delivered on the nineteenth day of November in the same year, the said The Keweenaw Association, (Limited), conveyed and quit-claimed said lands to the said Michael Donohue, then residing in the Township of Iron River, County of Iron and State of Michigan, which deed is recorded in the office of the register of deeds of said County of Iron in Liber Q of Deeds at Page 347.

And Whereas in the same suit said The Keweenaw Association, (Limited), subsequently and on the nineteenth day of April, in the year one thousand nine hundred five, obtained a further decree in said Court against the United States and Michael Donohue and many others, quieting its title in a large body of lands, including the lands above described;

And whereas the said Michael Donohue has sold and conveyed the said land and the same is now held by divers persons claiming
86 and holding undivided interests therein under and through said conveyance from said Michael Donohue.

And Whereas the holders of said undivided interest are apprehensive that their title may be clouded by said last mentioned decree and have asked to have said cloud removed by quit-claim.

And Whereas the Keweenaw Land Association, (Limited), has succeeded to all the right, title and interest which said The Keweenaw Association, (Limited), could or might claim in and to said lands;

Now, Therefore, the said Keweenaw Land Association, (Limited), a partnership association formed and existing under the laws of the State of Michigan, in consideration of the premises does hereby disclaim all right, title and interest in the lands above described by virtue of said last mentioned decree, the said Keweenaw Land Association, (Limited), in consideration of the sum of one dollar to it in hand paid by the several parties interested in said lands as aforesaid, the receipt whereof is hereby acknowledged, does hereby convey and quit-claim all right, title and interest in and to said land to the said several parties holding and rightfully claiming under and thru any conveyance or conveyances from said Michael Donohue covering said lands. To have and to hold the said lands, to the said several grantees under and thru the said Michael Donohue, in proportion to the several interests held or rightfully claimed by them, under and thru said Michael Donohue, and to their heirs and assigns, forever.

In Witness Whereof, the said the Keweenaw Land Association, (Limited), has caused these presents to be signed by its chair-
87 man and treasurer and its seal to be hereunto affixed this second day of October in the year one thousand nine hundred and nine.

KEWEENAW LAND ASSOCIATION
(LIMITED), [SEAL.]
By THEO. M. DAVIS, *Chairman, and*
DUDLEY S. DEAN, *Treasurer.*

Signed and Sealed in Presence of:

F. B. WRIGHT.
M. S. LAWRENCE.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this second day of October, A. D., 1909, before me, personally appeared Dudley S. Dean, treasurer of the Keweenaw Land Asso-

ciation, (Limited), and acknowledged that he executed the foregoing deed as the act and deed of the sai Kewe-naw Land Association, (Limited), and said Dudley S. Dean, being duly sworn did depose and say that the foregoing deed was executed by Theodore M. Davis, who is chairman and by himself, who is treasurer of said Keweenaw Land Association, (Limited), as a scroll was thereto affixed by him as a seal of said association, by authority of the managers, thereof, said association not having adopted an association seal.

[SEAL.] OSBORNE H. PITCHER,
Notary Public in and for said County.

My Commission expires March 29, 1912.

STATE OF MICHIGAN,
County of Iron, ss:

Register's Office for the County of Iron.

I, Alex D. Rogers, register of deeds for said county, do hereby certify that I have compared the foregoing copy of deed of release Keweenaw Land Association, (Limited), to Michael Donohue and grantees, with the original record thereof now remaining in this office, and that the same is a correct transcript therefrom, and of the whole of such original record.

88 In testimony whereof, I have hereunto set my hand and affixed the seal of the said register of deeds, at Crystal Falls in said county, this 11th day of March, A. D., 1914.

[SEAL.] ALEX D. ROGERS,
Register of Deeds.

Recorded in Iron county, Michigan, the 21st day of October, A. D., 1909, at 3 o'clock P. M., and recorded in Liber 16 of Deeds, on Page 460-461.

Mr. Ryall: I also offer the record of a conveyance from the Keweenaw Association, (Limited), to Keweenaw Land Association, (Limited), dated October 28, 1908. Recorded December 18, 1908, in Liber 9 of Deeds. Page 439, being a blanket deed.

"Conveying to the Keweenaw Land Association, (Limited), all the lands which at the date of said deed were owned by The Keweenaw Association, (Limited)."

(Paper marked "Complainant's Exhibit S.")

Mr. Ball: There is an objection to that, as irrelevant. It has no bearing on the title to this land.

Mr. Ryall: I also have here and will offer the original deed from the Keweenaw Association, (Limited), to Michael Donohue, dated October 31, 1896, and recorded November 30, 1896, in Liber Q of Deeds, Page 347.

Paper received in evidence and marked "Complainant's Exhibit T" and reads as follows:

COMPLAINANT'S EXHIBIT T.

This indenture, made this thirty-first day of October, in
89 the year of our Lord, one thousand eight hundred and ninety-six, between The Keweenaw Association, (Limited), a partnership association formed under the laws of the State of Michigan, party of the first part, and Michael Donohue of Iron River, in the County of Iron and State of Michigan, party of the second part, witnesseth,

That the said party of the first part, for and in consideration of the sum of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby confessed and acknowledged, doth by these presents, grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part and to his heirs and assigns, forever all its right, title and interest in and to that certain piece or parcel of land situated in the Township of Iron River in the County of Iron, and State of Michigan, known and described as follows: The west half of the northwest quarter and northwest quarter of southwest quarter of Section twenty-three in township forty-three north of range thirty-five west, together, with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the said parcel of land to the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said party of the first part has caused its seal to be hereunto set and this indenture to be signed by its chairman and treasurer, the day and year first above written.

THE KEWEENAW ASSOCIATION
(LIMITED), [SEAL.]
By THEO. M. DAVIS, *Chairman, and*
BENJ. C. DEAN, *Treasurer.*

90 Signed and sealed in presence of—
D. H. BALL.
BENJ. VOSPER.

STATE OF MICHIGAN,
County of Kent, ss:

On this nineteenth day of November, A. D., 1896, before me personally appeared Benjamin C. Dean, treasurer of the Keweenaw Association, (Limited), and acknowledged that he executed the foregoing deed as the act and deed of the said Keweenaw Association, (Limited), and said Benjamin C. Dean, being duly sworn did depose and say that the above deed was executed by Theodore M. Davis, who is chairman, and by himself, who is treasurer of said Keweenaw Association, (Limited), and a scroll was thereto affixed by him as a seal of said Association, by authority of the managers thereof, said Association not having adopted an association seal.

DAN H. BALL,
Notary Public for the County of Marquette.

REGISTER'S OFFICE,
Iron County, Mich., ss:

Received for record the 30th day of November, A. D., 1896, at ten o'clock A. M., and recorded in Liber Q of Deeds on Page 347.
G. E. VOOS, *Register.*

Mr. Ryall: Also the original quit-claim deed from Michael Donohue to Martin Donohue, dated December 3, 1896. Recorded in Liber P of Deeds, Page 555.
(Paper marked "Complainant's Exhibit W.)
I also offer a deed dated August 13, 1913, from Michael Donohue to Martin Donohue, covering these premises, recorded December 15, 1913, in Liber 26 of Deeds, Page 280.
(Paper marked "Complainant's Exhibit V.")

91 Mr. Ball: I object to that as irrelevant. It has no bearing on the title.

Mr. Ryall: Also a deed dated September 25, 1913, from Bridget Donohue by her guardian to Martin Donohue, covering the same premises. Recorded December 15th, in Liber 26 of Deeds, Page 282.
(Paper marked "Complainant's Exhibit X.")

Mr. Ball: That is objected to for the same reason as the last deed.

MARTIN DONOHUE, sworn in his own behalf, testified as follows:

Direct examination.

By Mr. Ryall:

My first name is Martin and my middle name is Edward, and I live at Iron River. I know the W. ½ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼ of Sec. 23-43-35. That is where I live, about a mile and a half or a mile and three-quarters from Iron River. I have lived on that property about 17 years. I had been on it prior to that time, and had lived on it before then with my brother Michael. I first began to live on it in the fall of 1895. That is when I first came to this country. Prior to that time I lived at Manitowoc, Wisconsin. My brother was living there when I first came up into this country. I think it was in the neighborhood of 1882 and 1883 that he moved on there. When I came there in 1885 there was a house on it.

All this class of testimony was objected to by defendant's counsel as incompetent, irrelevant and immaterial.

Michael Donohue claimed that he built it. It was built before I got there. Part of the land had been cleared. About two
92 acres when I first came.

This was objected to as irrelevant.

I helped Michael cultivate the soil to hold down the place, and did some work on it by way of clearing it. I and my brother

continued to live there each year until 1896, until I finally bought it from him.

Mr. Ball: The same objection as before.

Mr. Ryall: I concede that any objection may be made once for all.

My brother was an unmarried man at that time when I bought from him. I was not married at that time. I worked away from the place sometimes. When we were living on the place we were raising crops and cleaning up and picking the rock out of it, and built a big rock fence, and some wire and post fences. I put up a big hay shed and barn. It has been continuously the place where I and my brother kept our clothes and cooking utensils and all our home utensils since 1885. There had not been any year during that time that I have not done some work on the property. There were times when we used this enire 120 acres for some purpose or other. There was timber on it when I first went on the land. The pine timber was cut off. I don't know what company took the pine. It was cut since I came by some company. They left the hardwood. Some of that I cut off myself, and sold it for cordwood, and I used some for stove wood, and I hauled some logs off of it. There is about 27 acres under cultivation now. The rest of it is used for pasture. I cut most of my wood for stove wood off the north forty. Most of such timber as is left on the land is located on the north forty. The only merchantable timber is for stove wood. There is not much left that would make lumber. The fire has run thru it so much. The hardwood was taken off at different times.

"All the foregoing testimony set forth in the last above
93 paragraph was brought by leading questions and was duly objected to by defendant's counsel for that reason, as well as for the reason that it was irrelevant."

I live at the property now, and have slept out there some times lately. I was married the first of October last year, and since that time I spent part of the time in the Village of Iron River, but somebody has been on the property all the time, and crops are planted this year. Crops have been planted on the property every year since I came there in 1885. During the time my brother lived there, in 1885, until the time he sold it to me, he claimed to own it as his own. I claimed it as my own ever since December, 1896.

I saw my brother frequently from December, 1894, to the time I bought it from him in 1896. He left this country in December, 1896, right after I purchased from him. During those two years, nor at any other time did my brother say anything to me about Mr. Vosper having any interest in this property. I did not know that Mr. Vosper had or claimed to have any interest in it when I bought it in 1896.

Mr. Ball: I object to that as irrelevant. I suppose I may have an objection?

Mr. Ryall: You may have all the objections you want to anything of any sort at any time.

Q. When I bought from my brother in 1896, I supposed there was nothing against the land. I paid a price at that time which represented the fair value of the entire interest in the property. I was to pay only $600.00, but I had to pay certain back taxes, and there was $17.00 taken out of the $600.00. I paid the rest. After I paid him, I continued to live on there myself, and under the same conditions as I testified to here as to the use of the land.

94 The first I heard of Mr. Vosper claiming any interest in this property was in 1907. It was brought to my attention by a man writing to me from Crystal Falls. This letter of August 17th, 1907, dated at Crystal Falls, Michigan, and addressed to me at Iron River, and signed John E. McGillis, is the letter that first gave me any information about it.

Letter offered in evidence, marked complainant's Exhibit A1, reads as follows:

CRYSTAL FALLS, MICH., August 17, 1907.

Mr. Martin Donohue, Iron River, Mich.

DEAR SIR: Have you given an option on your eighty acres—W. ½ of N. W. ¼ Sec. 23-43-35? Looking up the record title I find that Mike deeded an und. ¼ interest in the mineral rights to Benjamin Vosper. Mike made no reference to this in his deed to you. If you have it place- I'd like to get the option. I think tho- you will have to figure with Vosper unless, of course, he deeded back or released to Mike but such an instrument I did not find of record.

Yours,

JNO. E. McGILLIS.

John E. McGillis, I think, was county treasurer at that time I knew him. I do not remember whether I made any reply to this letter from Mr. McGillis. I took it up with my brother right away, and wrote to him and mentioned about this deed Mr. Vosper had on file but he wrote back to me, and denied all knowledge of anything of that kind.

This letter dated Alloez, September 9, 1907, is in my brother's handwriting, and it is the letter I received from him. I was writing to him to find out what there was to this claim of Mr. Vosper's.

95 Letter offered in evidence, and marked Complainant's Exhibit B1, and reads as follows, viz:

ALLOEZ, Sept. 9, 1907.

Mr. Martin Donohue.

DEAR BROTHER: Your letter was a big surprise to me when I received your letter. Stating that Ben Vosper had a quarter interest in your land if he has then I do not no anything about it. I no the people were talking about giving him a quarter but I did not sighn any paper unless I was drunk, and did not no what I was doing. I have no papers to that effect, nor Ben Vosper either unless they are forgerys.

If I did sign a quarter interest to him I would have told you before I sold you the land as near as I can tell Ben Vosper dropped

out of the case and the homesteaders hired Rush Culber and I paid Rush Culber for my part, $150.00 and I thought the whole thing settled. But here about three years ago if you remember I told you about receiving a letter from the general land office stating I had no claim on the land the time the general land commissioner wrote to me I was in Alaska. The letter was giving me a chance to appeal my case. It gave me 60 days to appeal it in but the 60 days was gone by before I got the letter. I haven't done anything about it. So you see, according to the land commissioners decision, I did not own the land at all, and if I did not own the land how can Ben Vosper claim a quarter interest in it. It seems queer that Vosper should come around with a claim after 11 years has gone by. Martin, get some good man to write for you to the general land office. I wish that the land commissioners letter was not destroyed or I would send it to you and sent the discription of the land and ask him if I have any claim to it you got the only claim to
96 the land that is the quit-claim deed of the Canal Company.

I guess Vosper has heard there is Iron on the land and he wants to put in his oar for a slice.

Martin, every time Vosper came to Iron River to do any fighting for us each homesteader chipped in and paid him quite a sum of money to go to Marquette to fight our case.

Kind regards from myself and wife,

M. J. DONOHUE,
Allonez, Wash.

Defendants' counsel objected to the reception of said letter as incompetent, being hearsay and as irrelevant.

That is where my brother was at that time. Up to the late summer of 1907, all I had heard of Mr. Vosper was of his being around Iron River at different times. I had heard his name mentioned. I never knew anything about his being out on the property at any time during the time I had been there from 1895 on. I had never seen him there. At no time from 1885 up to the present, with the exception of such people as have been there in connection with the mining lease, there has been no one else on that property, using any part of it excepting myself or my brother. Mr. Abbott came there and put in his claim. I think that was in September, 1907. He claimed he had a quarter interest in it. I told him I would have to dispute his deed. He did not take possession, and no one has taken possession at any time.

Mr. Ryall: I wish to offer in evidence the record of a deed in connection with this evidence, from Benjamin Vosper, and wife to Fred H. Abbott, dated April 3, 1908, and recorded April 7, 1908, in Liber Y, Page 542, covering an undivided one-eighth of these lands.

I also wish to offer the record of a mining lease dated March 7, 1910, recorded November 3, 1910, in Liber 10 of Miscel-
97 laneous Records, Page 520, covering the lands in question, from Mr. Donohue and others to the Niagara Iron Mining Co., and the assignment thereof to the Buffalo Iron Mining Co. I

have not the page of the record of the assignment. It is admitted by the pleadings.

Said record was the record of a mining lease dated March 7th, 1910, between Martin E. Donohue, the complainant herein, Martin S. McDonough, John Robert Lyons, George L. Woodworth and wife, David H. Campbell and wife, Fred H. Abbott and wife, Benjamin Vosper and wife, Maurice J. Tonkin, parties of the first part as lessors and Niagara Iron Mining Company, the assignor of the defendant, Buffalo Iron Mining Company, as party of the second part as lessee. This lease covers the lands in litigation in this suit, and runs for a period of thirty years from the date thereof, and was duly signed, acknowledged by all the parties thereto and duly witnessed, and was for the purpose of exploring for, opening up, mining, taking out and removing therefrom the iron ore which is or which hereafter may be found in, on or under said land, said lease provided for the payment by the lessee, or its assigns, of royalty on all ore removed, or to be removed, from said premises, under said lease, of twenty-four cents a ton on all non-Bessemer ore and forty cents a ton on all Bessemer ore; and it further provided for payment by the lessee to the lessors, as royalty, of the sum of four thousand dollars ($4,000.00) in each and every year, whether the royalty therein provided for on ore removed should amount to that sum or not, which payment was to be made quarterly; and such payment was declared to be fixed annual ground rent for the use and occupation of the land; and that, if said ground rent, paid in any year, should exceed the royalty paid on ore actually removed, the
98 excess should be credited on ore to be removed thereafter. Paragraph 17 of said lease reads as follows:

17. It is mutually und-rstood and agreed among all the parties hereto, and it is hereby declared, that the respective interests of the parties of the first part hereto, in the property hereby leased, are as follows, viz: Martin E. (M. E. McD.) Donohue, an undivided twenty-five ninety-sixths (25-96) interest therein; Martin S. McDonough, an undivided one-sixth (1-6) interest therein; John Robert Lyons, an undivided one-twelfth (1-12) interest therein; George L. Woodworth, an undivided one-eighth (1-8) interest therein; David H. Campbell, an undivided eleven-ninety-sixth (11-96) interest therein, Fred H. Abbott, an undivided three-thirty-seconds (3-32) interest therein; Benjamin Vosper, an undivided one-eighth (1-8) interest; and Maurice J. Tonkin, an undivided one-thirty-second (1-32) interest therein; (the said Bessie S. Woodsworth, Mary E. Campbell, Emma L. Abbott and Lucia Vosper joining herein in order that their respective inchoate rights of dower may be released, bound and included under the terms and provisions of this instrument), and it is expressly understood and agreed that the said parties of the first part shall share in the distribution of royalties, profits, rents and benefits under this lease, including the minimum royalty herein provided for, in accordance with their respective interests above set forth and designated. The above statement of interests including only ownership in ores and minerals,

which shall govern absolutely the distribution of rents and royalties hereunder."

I never had any correspondence with Mr. Vosper in connection with this matter, even after 1907. He called to see me once this spring since this suit was commenced.

99 I was working on the Brule river with Joseph Piper in December, 1894, the year it is claimed that Mike gave his deed to Mr. Vosper. My brother, Mike, was working there too at the same camp. He was cooking in the camp.

I remember where we were during the holiday week, of 1894. We came down on the 24th of December, and we celebrated Christmas, and went back to the camp on the 26th. We walked down and walked back. I think we used to call it 20 miles. During those two or three days we stayed at Iron River around the saloons. Michael was drinking at that time.

Q. Do you know whether or not he became intoxicated at that time?

Mr. Ball: I object to that as irrelevant.

A. He was pretty well under the weather at Christmas time.

Mr. Ryall:

Q. Was Michael in the habit of drinking to excess?
A. Well, not so bad, altogether.
Q. Did he occasionally drink to excess?
A. He would have a little spree once in a while.
Q. Was he a man whom it took very much liquor to intoxicate?
A. No sir.
Q. What would you say as to whether he was easily intoxicated?
A. Well, he would not stand so much drink altogether.
Q. Now, during these few days you were down there, how much did you drink, or to what extent did you and he drink?
A. The most we drank was the evening we came down.

Q. Where was that?

100 A. Well, there was a part in Nick Diedrick's saloon, and some of it I think in Jim Harrington's.

Q. Did you have any money with you when you came from the woods?
A. We had a little.
Q. Did Mike have money?
A. We drew a little.
Q. How much of the time while you were down there was Mike under the influence of liquor?
A. Well, just that evening is all I could say, either of us.
Q. What condition were you in on Christmas, do you know?
A. Kind of sick. We got quite under the influence of drink altogether.
Q. Was Mike in that condition?
A. Well, he didn't let on to me. He was around.

We went back on the 26th. It was along about 9 or 10 o'clock in the morning. On the 29th of December I was working at th

camp, and Mike as near as I can get at it was in the camp too. The cook went out of the camp. I am pretty sure he went out of the camp on the 29th. There was no cook there besides him. Sometimes I came to dinner and sometimes we took dinner, but that particular time we came in to dinner. He was there right along as far as I seen.

The next time we came down was about the first of March following. Jesse Allen succeeded him as cook. He now lives at Iron River. I knew Patrick O'Brien, the editor of one of the papers at Iron River at that time. I never saw him out there at camp during the month of November, 1894.

I knew M. J. Mitchell. He was marshall of Iron River, I can't say whether he had any connection with these homestead matters which my brother was interested in against the Lake Superior
101 Ship Canal, Railway & Iron Company in contest against the Government. He was one of the so-called homesteaders. He is now dead, having died 14 or 15 years ago.

After I bought this land from my brother I paid the taxes. These papers which you show me are the tax receipts for the various years that I paid. I paid them as they show on their face, and at the time indicated.

Mr. Ryall: I offer in evidence these various tax receipts for 1895 and 1897 to 1911 each inclusive.

These receipts were received in evidence without objection, and marked Complainant's Exhibit C. Each of these receipts from 1895 and 1897 to 1907 each inclusive cover the entire interest in the premises referred to in the bill of complaint, and all of them purport to run to Martin Donohue. Martin Donohue paid only 3-4ths of the taxes for the years 1908 and 1909. The receipts for the taxes of 1895 and 1898 and 1905 are from the county treasurer's office. All the other receipts are from the township treasurer of Iron River. All these receipts, excepting the years 1910 and 1911, recite that the taxes were "received of Martin Donohue." The taxes for 1910 and 1911 recite that they were "received of Niagara Iron Mining Company."

These receipts show that the amount of taxes paid by Martin Donohue on the entire — for the several years are as follows, viz:

	For 1895	$17.10
	For 1897	19.06
	For 1898	25.74
	For 1899	15.20
	For 1900	10.42
	For 1901	9.92
	For 1902	20.63
102	For 1903	21.41
	For 1904	25.59
	For 1905	39.17
	For 1906	34.00
	For 1909	24.21

I have no receipt for the taxes of the year 1896, which is the year I bought the land from my brother. There was no taxes against me that year. I do not know why. The Land Company must have paid the taxes. I went to pay them and found that they had been paid.

Neither Mr. Vosper or any other person ever offered to pay any part of these taxes to me. Since 1911 the Mining Company has paid the taxes under the lease. These are valuable lands, and are worth more than $100.00.

Cross-examination.

By Mr. Ball:

When I came to Iron River I lived with my brother Michael. I did not claim to own the property until I got the deed in 1896. I just merely lived with him, and worked for him. Michael Donohue claimed to own it as pre-emption land or a homestead or whatever it was. He claimed he was trying to get it under the pre-emption laws. I know that he claimed to have filed a pre-emption claim on it and was living there, and claiming to occupy it as pre-emption claimant, until he proved up. I was not living with him all the time. I lived in the Village of Iron River afterwards for some time. I used to drop in every once in a while.

I started to live there in the village since last fall. I got a deed of this land from Michael Donohue in 1896. I was not living on the place just then. I was then at Chicagon lake. I
103–112 continued to live there until the 17th or 18th of December of that year, and I was in the woods for a couple of months, and then I went back to Iron River again to live and went out to the place right after that. Off and on I stayed in Iron River. I can't say how long a time I lived in Iron River after that, but it was not for two or three years at a time.

* * * * * * *

113 BENJAMIN VOSPER, one of the defendants, shown as a witness on the part of the defendants, testified as follows:

114 I am one of the defendants in this case and reside at the city of Ionia. I was born in that county. I am seventy years old next May. Up to twelve years ago I practiced law; since then I have been lumbering. I was employed in regard to certain homesteaders and preemption men claiming lands in the neighborhood of Iron River and, as I recall it, I was first employed on these cases in the winter of 1888 and 1889. Michael Donohue was one of the parties by whom I was employed as attorney, to endeavor to protect his possession and claim to the lands mentioned in this suit.

I was at Marquette before the local land office on some matters about some lands in the Ontonagon region, and it seems that the United States marshal was up here with writs of eviction, issued by the United States Circuit Court against a whole lot of people down near Iron River. While at Marquette I received a telegram, and I think it came from Iron River, and they desired me to come down

there at once, and that my expenses and compensation would be guaranteed. I could not say whom the telegram came from. In response to the telegram I went to Iron River and met this whole bunch, what is called homesteaders. The United States Marshal was there with a posse to evict these people from their cabins scattered through the country. I cannot recall all of the particular individuals; I know I met so many of them. We had a meeting in the school house. I know Mr. Mitchell was there and I am very confident that Mr. Michael Donohue was there.

They had a meeting and they submitted the case, and we talked it over, about what they should do. I simply advised that under the circumstances they should offer no resistance to the United States Marshal under the process, and that I would wire Judge Severens to see if I could not get a stay of proceedings until I could
115 make a proper showing on a motion for new trial. I sent a long telegram to Judge Severens explaining the situation and got a very lengthy telegram stating substantially that he could not act on telegrams and he could not interfere in the matter. So I had a conference with the United States Marshal and explained the situation. The Marshal was at Iron River with his writs and he advised me that he was up there to evict these different claimants and put them out of their cabins, and destroy them so that they would never come back again. I intimated to him that it was rather a dangerous business to do and he said he was not going to do it. Finally he wanted to consult the Judge before he would go any farther and that gave me an opportunity to make a motion for a new trial, which I did.

At that time they made up a purse for me; I cannot state the amount of it. It was to pay my expenses to go to Grand Rapids and enter motion for a new trial. I cannot say the amount of it, but they made up a purse, and I do not know who contributed to it, but I went immediately to Grand Rapids. I made affidavits before I left Iron River as a basis for the motion for new trial, and presented it to the Judge, and he gave a stay of proceedings until the motion could be heard and subsequently vacated the judgment, so far as we desired to retray the cases; he said in any case that we desired to retray—there were some seventy or eighty cases at least.

A new trial was granted and judgment stayed on my application in the Michael Donohue case. That was one of the cases in which the judgment of eviction was set aside. That was before the passage by Congress of the Forfeiture Act of March 2, 1889.

After the passage of that act I went up to Iron River again
116 and interviewed all these people, or a large percentage of them, and told them that it changed the entire situation and that under the act they could not get the land under the homestead or preemption laws, and that they should file a new application under the confirmatory provisions of that Forfeiture Act, and I think I prepared and had printed a form of application for these people to assert their claims under the confirmatory provisions of that act.

Th Lake Superior Ship Canal, Railway & Iron Company was the plaintiff in that ejectment case against Michael Donohue. I got the

judgment set aside and the case came on for trial in May, 1889, and the court directed a verdict. There were three distinct cases tried that we thought would raise all the questions that we should raise in any case, and Michael Donohue's was one of those three cases.

The records in that case were here put in evidence, consisting of a declaration in ejectment, of the Lake Superior Ship Canal, Railway & Iron Company against Michael Donohue, defendant, for the recovery of the lands involved in this suit in the United States Court, a plea of the general issue and the verdict of the jury in favor of the plaintiff, and it showed that the case was appealed to the Supreme Court of the United States.

Witness: The court directed a verdict against all three defendants and in favor of the plaintiff the Lake Superior Ship Canal, Railway & Iron Company. Mr. Donohue was one of them.

I made a motion for a new trial and it was heard before the Circuit Judge at Detroit. The result of the motion for new trial was that the judgment was set aside in the three cases and a new trial ordered. After that the cases came on for a second trial, that is, the second trial after I got into the case. That was in August of
117 1890. The result of that trial was that the Judge directed a verdict against the plaintiff in two of the cases and against us in one of the cases, and the one in which he directed the verdict against us was the Donohue case. The Canal Company appealed the two cases wherein the verdict was directed against them, and I took the Donohue case on writ of error to the Supreme Court and the case was argued.

At these two trials before the United States Circuit Court I was there conducting the trial in both cases. I was attorney of record in the case. I think the first time we were two or three days trying it. Judge Dillon and Alfred Russell of Detroit were connected with it, and Judge Marston helped me in the first trial, and I got Don M. Dickinson to help me in the second trial.

I took the case to the United States Supreme Court. I think Mr. Dickinson and I together prepared the case for the Supreme Court. I am not sure but I did it alone. I went to Washington to attend the case and was at Washington at the time it was argued. I was there about ten days before the case was reached. The case was argued in Washington in the fall, somewhere after October I think, in 1894, four years after it was taken up, and decided in November of the same year.

The result was that the court reversed the ruling in the Donohue case and sent it back for another trial.

Immediately after that decision I went up to Iron River to see my clients. I started about Christmas time, possibly the day before, and I stayed there four or five days. I met Martin Donohue there and all or nearly all of the others. I explained the situation and the decision that had been made. I explained to them that the Supreme Court had held that whatever right the Canal Company got, they got it under the confirmatory provisions of that act. At all times
118 after the passage of the act I claimed that it vested the title either in the Canal Company or in the homesteaders, and the

Supreme Court decision confirmed me in that position. I so advised them, and for that reason they would have to institute new proceedings; that they could not get any rights under the homestead law. The proceedings were to be instituted after the passage of the act. I explained to them that to show their title they had got to prove that they were in possession of these lands on the first day of May, 1888, and had to prove such possession in good faith; had to claim possession of the premises by actual occupation. I advised them that it was necessary to make proof that they were in such possession on that date.

It was understood all the time that it was going to be contested by the Canal Company.

Q. Did you have any arrangements or understanding with these men, including Mr. Donohue, as to your compensation?

A. When we first got there—of course I was expecting the lands would be forfeited and be declared public lands. Immediately after the passage of the act I went down there; I was willing to go anywhere in the world and prosecute them through. They wanted to know how I would take the cases, and I told them distinctly I would take for my compensation, for my disbursements, I would take a quarter of whatever they realized out of the proceedings, and I required that they should give me a written contract to that effect.

Q. You speak about disbursements; who paid the expenses of the appeal to the Supreme Court?

A. They never paid a cent of anything.

I will state further that I made that arrangement that I would not take up any case unless these people made that arrangement,
119 and I think all, with the exception of two who gave me, as I remember now, mortgages for a distinct sum, I took a deed for an undivided quarter interest in the land, and I did not take up a case for anybody unless they made that arrangement with me. They gave me a warranty deed of the undivided quarter interest in the lands. Mr. Donohue made just such a deed as that at that time, before I ever brought his case at all. That was along in April or May, soon after the passage of the act of Congress of 1889.

Q. Where are those deeds?

A. When they made the new deeds I surrendered those to the different parties. They were all surrendered up. Every one that made a new deed I surrendered the old deed up to them.

Q. Why were the new deeds taken?

A. In the meantime, while the appeal was pending in the Supreme Court, the Canal Company denuded the lands of all timber, and I did not like that arrangement. I considered at that time that the timber was the principal value. Soon after the decision was made I insisted that these parties should make this other kind of deed, and every one of them, with the exception of one, made the same kind of deed that is made in this case.

Q. How did these differ from the old deeds?

A. That was simply an undivided quarter and didn't say anything about my right to recover for an equal share and interest for

cutting and removing the timber. I wanted to be sure of my one-quarter interest.

I got a deed from Michael Donohue of that kind.

The deed which was offered in evidence by complainant's
120 counsel, marked "Exhibit A 4|14|14," as hereinbefore set forth, was here shown to the witness.

Witness: This deed was made at Iron River. I wrote the body of the deed and the acknowledgment is written in my hand, by me. I had an interview with Michael Donohue at that time. I advised the people that I was coming up there and Mr. Mitchell and I met these people at the hotel, and the hotel man said we could have the parlor, and I just took one man at a time in the hotel parlor and explained the whole situation to him, that I would like to have the execution of this new deed. Mr. Donohue was there with the rest and we explained it to him. I was up there on purpose to secure the new deed and I looked after the execution and acknowledgment and witnessing of every deed, and as Mr. O'Brien said, after we were through there we went right over to Mr. O'Brien's office, and had the deeds properly executed and witnessed and acknowledged, and I put it in my pocket. This deed was made at that time under those circumstances.

I think there were thirty-six or thirty-seven deeds taken during four or five days, all in the same manner—one man at a time. That is what I was there for.

Q. State whether Michael Donohue signed that deed himself.

A. He certainly did, and acknowledged it, and I was present when he did it.

Mr. Mitchell witnessed it. I am very familiar with his handwriting. I have had a good deal of correspondence with him during all this litigation. He was a kind of representative of mine down there, and I was familiar with his signature and I know that is his signature.

While this was up in the United States Court, they were de-
121 nuding the land of this timber, and we tried of course one thing and another to keep them off, with out much avail, and we went to Washington I know and presented the matter to the Department of Justice at Washington, and asked them to interfere and enjoin them from cutting the timber until the Supreme Court could decide the case. That was before the Supreme Court decision. The Attorney General drew an injunction bill and an injunction was granted preventing the cutting of the timber on Donohue's land and all the rest of them. After this injunction was granted, some how or other somebody was mean enough to start a fire wherever the Metropolitan Lumber Company wanted to cut, whenever they got over the limit, and then the Canal Company themselves applied to the court to modify the injunction so as to preserve the timber that had been destroyed by fire, and the court kept modifying the injunction, and finally the Judge had so many applications for modification that he granted an omnibus order and that ended the whole thing. I resisted these applications the best I could, and Judge Severens didn't have an idea that we had much right.

After that in order to establish the title to the Donohue tract and the other tracts, we filed the requisite papers in the local land office to establish our claim under the confirmatory provisions of that act for Mr. Donohue and all the rest. I represented Mr. Donohue at that hearing. The local land office decision was in favor of my clients in nearly every case, but one or two. It was before the local land office at Marquette in 1895, followed right along after the decision. Proofs were taken to establish our claim that they had possession of these lands, and witnesses were brought there. There was a contest, and you (addressing Mr. Ball), represented the Canal Company. Witnesses were produced and examined and cross
122 examined; and the case was argued like any other trial.

The decision of the land office was in favor of Mr. Donohue, in favor of nearly all the claimants, and the Canal Company took an appeal to the Commissioner of the General Land Office, and I filed a brief of the facts before the Commissioner and the Commissioner sustained the local office, as I remember it, in nearly all the decisions, and the Canal Company appealed to the Secretary of the Interior and I filed additional briefs there. The Secretary of the Interior by his decision disposed of many of the cases. This Donohue case was settled. The Secretary of the Interior never passed upon it.

In the United States case that I have mentioned there was the bill and cross bill and supplemental cross bill, etc., that have been offered in evidence. I represented Mr. Donohue and all the defendants in the cross bill, and the United States of course was represented by the United States District Attorney, and I represented the homestead claimants. In the original bill neither the homestead claimants nor I were made parties. It was filed to prevent the cutting of timber by the United States against the Canal Company and their grantees. The homesteaders were brought in under the cross bill. I appeared for myself and these parties, and demurred to the cross bill.

Negotiations for settlement had been pending for some time and finally consummated. I had to do with all these negotiations from beginning to end, and the money was all paid over to me.

Q. There has been a decree offered in evidence, a certified copy, where there were some eleven or twelve or more cases that were embodied in the decree, including Michael Donohue, under date of the 17th of November, 1896. State whether you conducted the
123 negotiations that brought about that settlement.

A. I did.

We had considerable correspondence, and met Mr. Davis, President of the Canal Company and the Keweenaw Association, and subsequently I met Mr. Davis and Mr. Ball in Washington. I also met them once in Milwaukee. I went from my home to these different places in order to carry on the negotiations.

We all met in Washington. I was requested to go to Washington and see how we could best consummate it after we had kind of agreed on a settlement. Of course the United States was a party in this equity suit and it was necessary to get them into the settlement. We went down to Washington and took it up with the Secretary of

the Interior and with the Department of Justice and the Attorney General. On presentation of the facts he decided he would consent to the entry of a decree, so far as he knew at that time, that was satisfactory, and it was conceded that either the Canal Company owned the land or we owned the land, one or the other. And the Attorney General was to write a letter to the District Attorney, Mr. Power at that time, and after an interview with Mr. Power he consented to such a decree as was saisfactory to us.

After the arrangement was made with the Attorney General and the Secretary of the Interior, we consummated the settlement. We went to Grand Rapids for that. This case had been transferred to the southern division and we went before the Judge with the matter, with the decree and everything else, and the Canal Company's treasurer was there, and the settlement was consummated right there. The decree entered in November, 1896, was the result of the compromise agreement that was made.

Q. Among the documents it appears that Mr. Culver had
124 something to do with it. Was Mr. Culver associated with you in any way in bringing about that settlement or finally consummating the decree?

A. He was not associated with me in any cases. I had a letter from Mr. Culver and he said some of the parties up here were friends of his, and they were very anxious to get a settlement and he could get somethings out of it. And I said to Mr. Culver then that in order to protect myself as solicitor in the case, and the Canal Company required it also, so as to have something authentic on the records, that he must give a written consent duly acknowledging that the decree should be entered in the case quieting the title in the Canal Company, and he said they were going to pay him for his trouble about it. I said, "All right, we are going to meet in Grand Rapids at a certain time, and you can be down there." All we agreed about was the authorization, and he brought me that paper.

Q. This authority that I am showing you?

A. Yes, sir. He was there in person.

Said paper, so testified to by the witness, was here offered in evidence, marked "Defendants' Exhibit 2." It was a stipulation entitled in the Circuit Court of the United States for the southern division of the western district of Michigan, in Equity, and in the case of the United States of America against the Lake Superior Ship Canal, Railway & Iron Company, the Keweenaw Association, (Limited,) and others, and also entitled in the cross bill of the Lake Superior Ship Canal, Railway & Iron Company and the Keweenaw Association, (Limited,) against the United States of America and many others. The stipulation was signed by a number of persons, and among them Michael Donohue, empowering Rush
125 Culver to appear for the parties named therein, and by stipulation in writing or by consent in open court to consent to a decree, so far as the lands claimed by them were concerned, in favor of the complainant in said cross bill, declaring and quieting the title to said land in the Keweenaw Association, (Limited,) The stipulation set forth the different parcels of land claimed by each of the parties thereto, and among other parcels described the west half of

the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (23), in township forty-three (43) north, of range thirty-five (35) west, in the upper peninsula of the State of Michigan. Said stipulation was signed by the parties thereto and among others by Michael Donohue (signed as Michael J. Donohue,) and was acknowledged on the 8th day of September, 1896, before Martin M. Lally, a Justice of the Peace for the County of Iron in the State of Michigan.

Witness: This was filed as my authority in every case. Every time we made a settlement there would be a decree similar to that.

A day or two after that decree a deed was given to Michael Donohue for this land in pursuance of the settlement. There was money paid him; my recollection is it was $1,000.00. I took out my $250.00, one-quarter of it, and handed the balance to Mr. Donohue.

Q. Now, Mr. Vosper, about the expenses. You say they never paid a cent. Who paid the cost of taking the case of Donohue to the Supreme Court?

A. These expenses were paid, Don Dickinson and I, he paid part of them and I paid part. I think he paid for printing the briefs and I paid for printing the record. I know they had to be printed at Washington, but none of these claimants paid a cent.

I paid all my expenses to Washington and all the travelling
126 expenses and everything incidental to it. I never got anything from Mr. Donohue aside from this interest in the land and the $250. So far as the hearing in the land office was concerned, I said to the parties, "You will have to produce your own witnesses and you will have to pay for the printing of the notice of hearing, and will have to pay the register and receiver their fees and for the transcript of the testimony," and I presume Mr. Donohue paid those few items. I think they all paid them. That was the arrangement; they were to pay those. I think they paid in $10.00 to the register and receiver for writing out the testimony.

Cross-examination.

By Mr. Ryall:

Q. In connection with this Exhibit 2, being a consent to enter the decree at Grand Rapids: Was this paper signed by Mr. Donohue?

A. All I know is that that paper was brought down there by Mr. Culver. I appeared personally and consented to the decree so far as I was concerned, and acting for myself and on authority from Donohue and the other clients, I consented to these decrees. So far as Mr. Donohue was concerned, Mr. Culver never acted for him excepting in this particular paper that he brought down.

Q. Do you know where the money was in fact paid to Mr. Donohue?

A. I couldn't say. My recollection is that as far as Mr. Donohue was concerned—I think there were a couple of other parties that Mr. Culver brought down, and my idea is that all the money there was to go to Mr. Donohue, the $750.00, I turned over in pursuance

of that authority to M. Culver. I have nothing except my
127 memory in relation to that matter.

Q. You didn't preserve the written order?

A. I didn't preserve the written order. I tried to see if I couldn't find the checks. I couldn't even find those.

Q. All you have is your recollection that that is the way it was settled?

A. I feel quite sure that that is the way it was. The Canal Company paid over the money, they gave me the money and what was going to Mr. Donohue I handed to Mr. Culver, and in the other cases I remitted direct to the parties.

Q. Do you remember Donohue's testimony here to the effect that he did get his money from Rush Culver?

A. Well, I presume he did, but that is the way he got it. The Canal Company settled direct with me. Mr. Donohue wasn't there at all.

Q. You didn't come up north to pay over the money, or anything of that sort?

A. No, sir. I sent it all through letters; all that I remitted I sent in checks.

Q. You said when you came up here in 1894, you made some arrangement with Mr. Boyington to get the parlor in the Boyington house?

A. Yes, sir, he gave me the use of the parlor.

Q. You got each one of these men in?

A. One at a time.

Q. Did they sign there?

A. There might be some signed, but my idea is that I took them right over and had them signed right before Mr. O'Brien.

Q. Have you any distinct recollection of that?

A. I know most of them was done that way. Some of
128 them might have been signed over there at the hotel, but I always went with the men to take the acknowledgments. I was particular; that is what I was up there for, to see the things was consummated and consummated right.

Q. Was Mr. Mitchell with you in this parlor?

A. He was a sort of doorkeeper. There was some crowd there and he wouldn't let in but one man at a time.

Q. Wouldn't you say that it was just as likely that those deeds were signed at the Boyington house and acknowledged over before Mr. O'Brien?

A. It might have been done that way. I have no distinct recollection of Mr. Donohue from any of the other men at that time.

Q. Did you know that Mr. Donohue was a drinking man?

A. I never heard of it; he said they hadn't been drinking to excess when he signed that deed.

Q. Did you have any personal dealings with Mr. Donohue except as you dealt with him and all these homesteaders in that matter?

A. No, sir, no difference between him and any of the others. When we came to file a bond in this case I came to Marquette, and I had Mr. Donohue come up there, and this bond was drawn and signed and justified there at Marquette, in the Donohue appeal case.

Redirect examination:

The appeal bond from the files in the United States Court for the appeal of the case of the Lake Superior Ship Canal, Railway & Iron Company against Michael Donohue was shown to the witness.

Q. I show you this document and ask you if that is the appeal bond?

129–130 A. That is the bond. It is signed by Timothy Nester and myself, and Mr. Donohue.

The bond was offered in evidence, and was an ordinary appeal bond, purporting to be signed by Michael Donohue, was approved by the court and filed September 30th, 1890. It was a bond on writ of error to take the case to the Supreme Court.

Q. You were asked whether you had any dealings with Mr. Donohue except in these matters with all the others. Did you understand that?

A. I cannot recall specifically that Michael Donohue. I know this, that that paper I have had ever since was in that shape when I left Iron River. I know that he executed that deed. I cannot recall Mr. Donohue at any particular time among the thirty-seven others, but I know he was there and executed the deed.

* * * * * * *

131 Defendant's counsel introduced in evidence the following documents:

1. A supplemental list entitled: "Supplemental list of lands
132 selected by the agent of the State of Michigan, in the district of lands subject to sale at Marquette and granted to the State of Michigan by the act of Congress approved the 3rd of July, 1866, entitled: 'An Act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage lake, Keweenaw Point, Lake Superior, in said State,' being the vacant and unappropriated lands designated by odd numbers nearest the location of said canal." Said document contained the description of a list of lands amounting to upwards of 23,000 acres situated in the upper peninsula of this state among which were the west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (23), in township forty-three (43) north, of range thirty-five (35) west.

Said list was duly certified under date of May 19, 1871, by the Commissioner of the General Land Office, as a true and correct list of the tracts of land granted to the State of Michigan by act of Congress above mentioned, and as being the vacant lands designated by odd numbers not otherwise appropriated in the district of lands subject to sale at Marquette, in the upper peninsula and selected nearest the location of said canal; and the said Commissioner recommended that the same be approved, subject to any valid intervening rights which may have existed at the date of selection.

The approval of the Secretary of the Interior was added thereto as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON CITY, D. C., 22 May, 1871.

"Approved, subject to the conditions and rights above mentioned.
C. DELANO, *Secretary.*"

133 2. A copy of the certificate of the governor of the State of Michigan, duly certified, dated November 29, 1873, setting forth that he had caused the said Portage Lake Canal and Harbor to be duly examined by an engineer appointed by him, and had also made a personal examination of it, and had found "that the Portage Lake and Lake Superior Shop Canal Company, mentioned in said act (said company being now known as the Lake Superior Ship Canal, Railroad and Iron Company), has completed the canal mentioned in said act, in pursuance of the act of Congress, and in conformity with the plans and specifications;" but that he for the time being withheld the final certificate required to vest the title to the lands in said company, for the reason that the legal title to a portion of the land on which the canal was built was not vested in said company.

3. A copy of a certificate of the Governor of the State of Michigan duly certified, dated June 25, 1875, reciting the acts of Congress granting lands to the State of Michigan to aid in the construction of a ship canal and harbor from Portage lake to Lake Superior, and the act of the legislature of the State of Michigan conferring said grants upon the Portage Lake and Lake Superior Ship Canal Company, a corporation of the State of Michigan, whose name was afterwards changed to the Lake Superior Ship Canal, Railroad and Iron Company, and that the said work had been examined by an engineer appointed by him, in pursuance of the said act of the legislature, which engineer had reported to him that the said Lake Superior Ship Canal, Railroad & Iron Company had completed the said canal and harbor in conformity with the plans and specifications therefor and in pursuance of said acts of Congress and that he, the
134 said Governor had also made a personal examination thereof and found the same to be constructed and completed in accordance with the terms and requirements of said acts of Congress and of said act of the legislature of the State of Michigan and certifying as follows:

"Now therefore I, John J. Bagley, Governor of the State of Michigan, do hereby determine that said canal and harbor have been constructed by said company as required by said act of Congress, and in conformity with the plans and specifications therefor, and do accordingly hereby certify the same to said company."

Said certificate was recorded in the office of the register of deeds of said County of Iron. The record thereof was offered in evidence by the complainant's counsel and was described by him as "The Governor's certificate, stating that these lands were selected and certified to the State of Michigan for the company."

4. Certified copy from the office of the clerk of the Circuit Court of the United States for the eastern district of Michigan, of a decree of foreclosure, made by said court, February 12, 1877, in several

consolidated cases then pending therein, foreclosing certain mortgages and liens upon all the lands and other property of said Canal Company, and ordering the sale thereof, and of the report of the Master in Chancery of sale under said decree, dated May 11, 1877, setting forth that, pursuant to the said decree he had sold, at public sale, to Albon P. Man and Nathaniel Wilson, all the real estate, including the said land grants, made by the United States to the State of Michigan for the construction of said canal and harbor, and an order of said court, made at a session thereof held on the 14th day of May, 1877, confirming the said report of the said Master, and the sale so made by him. Said decree was rendered in several suits pending for the foreclosure of certain mortgages, exe-
135 cuted by the Lake Superior Ship Canal, Railroad & Iron Company to trustees, mentioned to secure the payment of certain bonds issued by said company.

5. The record of a deed executed by said Master in Chancery, under and pursuant to the above mentioned foreclosure sale, dated May 14, 1877, conveying to Albon P. Man and Nathaniel Wilson all the property of the said Lake Superior Ship Canal, Railroad & Iron Company, covered by the decree aforesaid, including the 200,000 acres of land granted by the act of Congress of July 3, 1866, to aid in the construction of a canal and harbor above mentioned, which deed was duly recorded in the office of the register of deeds of said County of Iron.

6. The record of a deed executed by Albon P. Man and Nathaniel Wilson, dated May 15, 1877, conveying to the Lake Superior Ship Canal, Railway & Iron Company, a corporation duly organized under and pursuant to the laws of the State of Michigan, all the real estate and other property covered by the above m-ntioned decree and mortgage sale and sold by the Master as aforesaid to the said Albon P. Man and Nathaniel Wilson, which deed was duly recorded in the office of the register of deeds for said County of Iron.

7. Articles of association of the Lake Superior Ship Canal, Railway & Iron Company, a corporation formed under the laws of the State of Michigan, dated May 14, 1877, showing the due incorporation of said Lake Superior Ship Canal, Railway & Iron Company.

8. Certified copy of release by the Chicago and Northwestern Railway Company, dated January 31, 1868, releasing and surrendering to the State of Michigan all claim to certain lands, said to have been granted by the United States to the State of Michigan for rail-
road purposes under act of Congress approved June 3, 1856,
136 and by the State of Michigan conferred upon a railroad company, to which said Chicago and Northwestern Railway Company claimed to be the successor, including the lands involved in this suit, which release was duly recorded in the office of the register of deeds for said County of Iron.

9. Certified copy of release by the State of Michigan, dated May 1, 1868, whereby the State of Michigan surrendered and released to the United States of America all right, title, interest and claim to the lands therein described, among which were the lands involved

in this suit, which release was duly recorded in the office of the register of deeds for said County of Iron.

10. Original agreement in writing, dated December 16, 1908, between Martin Donohue and Martin S. McDonough, of the village of Iron River, Iron county, Michigan, Fred H. Abbott and wife of Crystal Falls, Michigan, and Benjamin Vosper and wife of Ionia, Michigan, parties of the first part, and the Niagara Iron Mining Company, a corporation of the State of Michigan, whereby the said parties of the first part, in consideration of the agreements of the party of the second part therein contained, did give and grant to the said second party, its successors and assigns, the exclusive right and option to enter upon the west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (23), in township forty-three (43) north of range thirty-five (35) west, in said County of Iron, and explore for iron ore thereon, for one year from and after the date of the option, and further giving the said party of the second part of the option and right to call for and receive a lease of said premises for the purpose of mining
137 iron ore thereon at any time before the expiration of said option, and agreeing that in case said second party should call for the lease within the time mentioned the first parties would execute and deliver to said second party a mining lease of said premises for the period of thirty years, which should be upon the terms and conditions set forth in an unsigned form of mining lease attached thereto marked Exhibit A and made a part of said agreement. Said Exhibit A was a form of lease which was identical in all substantial particulars with the mining lease offered in evidence by complainant's counsel as above mentioned bearing date March 7, 1910. The form of lease attached to and made a part of said option contained the following statement: "It is mutually understood and agreed among all of the parties hereto, and it is hereby declared, that the respective interests of the parties of the first part hereto in the property hereby leased are as follows, viz:

Martin Donohue an undivided five-eighths interest therein;

Martin S. McDonough an undivided one-eighth interest therein;

Fred H. Abbott an undivided one-eighth interest therein; and the said Benjamin Vosper an undivided one-eighth interest therein; and it is expressly understood and agreed that the said parties of the first part shall share in the distribution of royalties, profits, rents and benefits under this lease, including the minimum royalty herein provided for, in accordance with their respective interests as above set forth and designated."

Said option was duly signed and acknowledged by all the parties thereto at or about the date thereof.

11. A copy of a letter from the Commissioner of the United States Land Office, addressed to the register and receiver at
138 Marquette, Michigan, duly certified, relating to a large number of contested claims, including the claim of Michael Donohue. The following is a copy of said letter, omitting the names and descriptions of land other than that of Michael Donohue:

F 3052 W. O. C. S. S. M.
W. R. J. 1901-116981.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., April 24, 1902.

Address only the Commissioner of the General Land Office.

Register and Receiver, Marquette, Michigan.

SIRS: Under various dates you transmitted the papers in the contests of the parties hereinafter named vs. The Portage Lake and Lake Superior Ship Canal Co., now known as the Lake Superior Ship Canal, Railway and Iron Co., involving the lands described.

This office docket number, the names of the parties and the lands involved in each contest are as follows, viz:

Docket No.	Name of contestant.	Lands involved.
*	* * * * * * *	
12-11198	Michael Donohue,	W. ½ N. W. ¼ & N. W. ¼ S. W. ¼ Sec. 23, T. 44 N. R. 35 W.
*	* * * * * * *	

Under date of July 22nd last Mr. Nathaniel Wilson, resident attorney for said railway and iron company, and the Keweenaw Association, (Limited,) filed in this office authenticated copies of certain decrees entered from time to time in the Circuit
139–142 Court of the United States for the Western District of Michigan in the case of the United States vs. The Lake Superior Ship Canal, Railway and Iron Co., the Keweenaw Association, (Limited,) et als., No. 1165 in Equity.

These decrees, entered with the consent of all parties to the suit (including the applicants named, adjudge that the title to the several tracts of land above described, (except the N. W. ¼ N. W. ¼ & S. E. ¼ N. W. ¼, 15-43-35 claimed by Oleson, S. E. ¼ S. E. ¼ 17-43-36 claimed by Morgan, and N. W. ¼ S. W. ¼ 17-43-35 claimed by McHugh,) severally claimed by the persons named in the respective decrees and described therein, has been fully and completely vested in the Keweenaw Association, (Limited,) and that neither the United States nor the several claimants named have any right, title or interest therein.

In view of said decrees you will call upon said parties to show cause within thirty days why said contests should not be dismissed (except as to the lands of Oleson, Morgan and McHugh, aforesaid, not embraced in the decrees,) and the cases closed, as to the parties named.

You are specially directed to send out these notices at once and to make prompt report upon the expiration of the time allowed.

Very respectfully,

BINGER HERMANN,
Commissioner.

143 *Supplemental Record.*

* * * * * * *

STATE OF MICHIGAN:

Supreme Court.

MARTIN DONAHUE
vs.
BENJAMIN VOSPER and Others.

Certain errors in the printed record in this cause should be corrected as follows:

Page 15. In the second line of Exhibit K, change "Northern Division" to "Southern Division."

Page 36. At bottom of page, the name of "Ball & Ball," as solicitors and of counsel for the defendants, should be inserted.

Page 46. 11th line from the bottom, change "February 3," to "February 2."

Page 50. 1st line, change word "motion" to "action."

Page 51. After the second line in the second paragraph after the words "continued in" insert "actual occupancy thereof until he quit-claimed to," so that it will read: "continued in actual occupancy thereof until he quit-claimed to the complainant in December 1896."

Page 55. At bottom of page, strike out the words "27th day of November" and insert "30th day of September."

144 Page 57. In line 5 the word "conveyance" should be "conveyed," and in line 6 the word "conveyed" should be "conveyance."

Page 57. In the last line of paragraph five, the words "said lands" should be stricken out and the following should be inserted: "all ores and minerals in said lands, together with the right to explore for, dig, mine and remove the same, without compensation to said Fred H. Abbott for the reasonable use of the surface of said lands for that purpose."

Page 58. In the sixth line of the paragraph commencing "It is further adjudged and decreed," insert, after the words "one-eighth," the word "thereof;" and strike out the words: "the said Fred H. Abbott is the owner of the undivided three thirty-seconds and the said Maurice J. Tonkin is the owner of the one thirty-second interest thereof," and insert in place thereof the following: "the said Fred H. Abbott is the owner of the undivided one-eighth thereof, except the undivided one thirty-second of all ores and minerals thereon or therein; and the said Maurice J. Tonkin is the owner of the undivided one thirty-second of all ores and minerals thereon or therein, together with the right to explore for, dig, mine and remove the same, without compensation to his grantor, the said Fred H. Abbott, for the reasonable use of the surface of said land for said purpose."

Page 88. In the 16th and 17th lines strike out the words "covering and other land."

Page 126. In second line of cross examination change "Exhibit 3" to "Exhibit 2."

Page 138. Sixth line from the bottom, after the words and figures: "44 N." insert "R. 35 W."

145 At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eleventh day of October in the year of our Lord one thousand nine hundred and fifteen.

Present the Honorable

Flavius L. Brooke, Chief Justice.
Aaron V. McAlvay,
Franz C. Kuhn,
John W. Stone,
Russell C. Ostrander,
John E. Bird,
Joseph B. Moore,
Joseph H. Steere,
Associate Justices.

26707.

MARTIN DONAHUE
vs.
BENJAMIN VOSPER et al.

This cause coming on to be heard is argued by Mr. Ryall for complainant and by Mr. Ball for defendants and duly submitted.

146 *Opinion.*

STATE OF MICHIGAN:

The Supreme Court,

MARTIN E. DONOHUE, Complainant and Appellant,
v.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, and the BUFFALO IRON MINING COMPANY, Defendants and Appellees.

Before the Full Bench.

KUHN, *J.:*

The complainant seeks by his bill to quiet the title to an undivided one-fourth interest in certain land which it is the claim of the defendants was conveyed to the defendant Vosper by a warranty deed from the complainant's grantor. This deed antedated a quitclaim deed given to the complainant by his grantor. In their answer the defendants, excepting the mining company, claimed

the benefit of a crossbill, and prayed that the title to the lands might be quieted against the complainant.

The land involved in this litigation was included in certain old grants by the United States Government to the State of Michigan to aid in the construction of two railroads, one to Marquette and the other to Ontonagon. It was a part of the "common lands" at the intersection of the proposed railroads. The lands applicable to the Marquette road were released by the State to the
147 United States, and later, in 1866, under an act of Congress granting lands to the State for canal purposes, these lands inured to the benefit of a canal company by grant from the State. The lands to be used for the benefit of the Ontonagon road were not released, and the United States Supreme Court, in a suit hereinafter referred to, adjudged that the title to an undivided half of the "common lands" still remained in the State for the purposes of this road, except as affected by an act of Congress in 1889 by which Congress declared a forfeiture of grants in the State of Michigan for all unconstructed railroads, and confirmed the title of all persons who had made cash entries within the limits of those grants and all persons claiming under State selection, such as the canal company. By an exception in the act, title was not confirmed in those lands on which there were bona fide pre-emption or homestead claims, asserted by actual occupation on May 1, 1888. Michael Donohue, the complainant's grantor, together with various other persons, had entered upon these common lands as pre-emptors and homesteaders.

Prior to the act of 1889 the canal company had brought ejectment suits against these settlers. In 1890, at the instigation of persons claiming as pre-emptors and homesteaders under the act of 1889, the United States filed a bill against the canal company, and others, claiming all these lands were lands of the United States and subject to entry under the homestead and pre-emption act, and prayed that the canal company be restrained from exercising
148 acts of ownership on the land, particularly cutting timber. The canal company claimed the lands as having vested in it by the granting act and the confirmatory act of 1889, and that none of the pre-emption or homestead claims were within the exception of the latter act.

In 1894 the canal company's ejectment suit was decided by the judgment of the Supreme Court hereinbefore referred to, which adjudged that the title to an undivided half of the "common lands" still remained in the State after the release of the lands granted for the construction of the Marquette railroad; that the title of the canal company to the lands selected to it by the State was confirmed by the act of 1889, subject to the exceptions provided in the act; and that it should be determined in an equity suit in the United States court what lands came within the excepting clause. But by the act of 1889 referred to, the title of the State to the lands granted for the Ontonagon railroad, including an undivided half of the common lands, was forfeited to the United States.

After the judgment in the Supreme Court of the United States,

the defendant Vosper, who had defended the ejectment suit for Donohue and the other homestead and pre-emption claimants, took from Donohue a warranty deed on December 29, 1894, for an undivided quarter interest in the land claimed by him, leaving a quarter interest in Donohue and a half interest in the canal company. It is asserted by defendant Vosper that he took this
149 deed for legal services performed.

In the suit of 1890 by the United States against the canal Company, the latter filed a crossbill against the claimants, including Donohue, claiming the title to all the land. The issue in that litigation, therefore, was whether Donohue and the other claimants were bona fide homesteaders or pre-emptors on May 1, 1888. On September 8, 1896, a number of the claimants, including Donohue, and Vosper claiming under him, consented to a decree quieting title to the lands in the Keweenaw Association, Limited, successor to the canal company, which was entered on November, 1896. That decree, the effect of which is disputed and becomes important in this litigation, contained the following provisions:

"It is ordered, adjudged, and decreed * * * that the title to the lands hereinafter described, * * * at the time of the commencement of this suit, was fully and completely vested in the Lake Superior Ship Canal, Railway and Iron Company, as in part satisfaction of the grant to the State of Michigan by the act of Congress of July 3, 1866, and has, since the commencement of this suit, become, and is now fully and completely vested in said Keweenaw Association (Limited), and that neither the United States of America nor any of the defendants aforesaid consenting to this decree, has any right, title, or interest therein.

"And it is further ordered, adjudged, and decreed that the title of said Keweenaw Association (Limited) in and to each and every of the parcels of the land hereinafter described, be, and the same is hereby forever quieted in the said Keweenaw Association (Limited) as against the said United States of America and each and every of the said defendants in the said crossbill hereto consenting and herein named.

"This decree shall stand and operate as a release and conveyance from the United States, and each and every of the other of said defendants, of all right and title to said lands, and may be recorded as such in the records of the proper county."

On November 19, 1896, the Keweenaw Association, Lim-
150 ited, conveyed the land in suit by quitclaim deed to Donohue.

It is the contention of Vosper that he and Donohue agreed to this arrangement, by which a sum of money was to be paid for the timber cut and the land was to be conveyed by the Keweenaw Association, Limited, to Donohue. On December 3, 1896, Michael Donohue delivered to the complainant, Martin Donohue, a quitclaim deed of the premises. On April 3, 1908, defendant Vosper quitclaimed an undivided one-eighth interest in the lands to the defendant Abbott, and on December 18, 1908, the complainant joined with the defendants Vosper and Abbot in the execution and delivery of an option for a mining lease of the premises. On or

about February 3, 1909, defendant Abbott quitclaimed an undivided one-thirty-second interest in the mineral to the defendant Tonkin, and on March 7, 1910, complainant joined with the defendants Vosper, Abbott, and Tonkin in the execution and delivery of a mining lease of the premises pursuant to the option given before. The mining lease, which was for a term of thirty years, was issued to the Niagara Iron Mining Company as lessee, and was by that company assigned to the defendant, the Buffalo Iron Mining Company. From the date of the lease until the assignment thereof to the defendant mining company, the Niagara Iron Mining Company was, and from that time forward the defendant mining company has been and is now, in possession of the premises for mining purposes.

The complainant makes the following contentions:

151 (1) That the deed of 1894 from Michael Donohue to Vosper was not signed, acknowledged, nor delivered by Donohue.

(2) That the decree of 1896 entirely cut off any right Vosper may have had in the land under the warranty deed of 1894.

(3) That he was a purchaser in good faith without notice of Vosper's claim.

(4) That the record of Vosper's deed was defective, and therefore not constructive notice to the complainant.

(5) That the complainant and his grantor have been in continuous adverse possession of the land since 1883, by virtue of which he has acquired a valid title as against Vosper.

The first contention of complainant raises the only material question of fact in dispute in this case,—as to whether the warranty deed of December 29, 1894, which purports to have been executed by Michael Donohue, was executed and delivered by him to the defendant Vosper. Complainant seeks to disprove the execution of this deed by the testimony of Michael Donohue to the effect that he does not recollect the making of such a deed, and that he was not at Iron River on the 29th day of December, 1894; and by his testimony that both he and Michael were at Iron River on Christmas day of that year, but went back to the camp where they were working, some ten or twelve miles away, on the 26th of December; and the testimony of Jesse Allen that Michael Donohue was cooking at the camp mentioned at or about Christmas time in 1894. Upon hearing all the testimony, seeing the witnesses, and comparing the signature on the deed with other signatures of Donohue which were fully authenticated, the learned trial judge found as a matter of fact that Michael Donohue, with full knowledge of what he was doing and

152 with an intention to convey as in the instrument set forth, signed, acknowledged, and delivered to the defendant a warranty deed on December 29, 1894, and that the consideration which he received therefor was valuable and adequate. After careful examination of the testimony, we are of the opinion that the complainant has not met the burden of proof which rests upon a person who seeks to deny the execution and acknowledgment of such a deed.

It is a well established rule that the certificate of a notary carries with it the usual presumption that the officer making it has certified

to the truth and has not been guilty of wrongful or criminal action. See Hourtienne v. Schnoor, 33 Mich. 274; Johnson v. Van Velsor, 113 Id. 208, 219; Cameron v. Culkins, 44 Id. 531; Dikeman v. Arnold, 78 Id. 455, 470. We are therefore in agreement with the circuit judges' finding of fact as to the complainant's first contention.

(2) The next contention of complainant involves the effect of the decree of the federal court. It is urged that this decree should stand and operate as a release and conveyance from the United States, Donohue, and Vosper to the Keweenaw Association, Limited, of "all right and title to said lands;" that since the covenant of warranty in the deed runs with the land, it went with the decretal conveyance to the Association with the consent of Vosper, and from the Association back to Michael Donohue, in whom it was extinguished; and that Vosper therefore lost any rights which he might have had under the covenant.

153 The difficulty with this contention, however, is that the decree in terms provides that neither Donohue nor Vosper had any right, title, or interest in the land, as it recites that Donohue, Vosper, and the United States

"acknowledge that the said Keweenaw Association (Limited) is, and the said Lake Superior Ship Canal, Railway and Iron Company was, at the time of the commencement of this suit, the lawful owner in fee, of the lands hereinafter described, * * *"

and adjudges

"that the title to the lands hereinafter described * * * at the time of the commencement of this suit, was fully and completely vested in the Lake Superior Ship Canal, Railway and Iron Company, * * * and has, since the commencement of this suit, become, and is now fully and completely, vested in said Keweenaw Association (Limited)," etc.

Now if the title was completely in the canal company at the commencement of the suit (December 18, 1890, which antedates the time of the warranty deed to Vosper), and went from it to the Keweenaw Association before the decree, how could the decree carry any interest in the land from Donohue and Vosper to the Keweenaw Association? And we do not think that it can be contended that Vosper was adjudged to have no title as a result of the release clause in the decree, since there was nothing to be released if he had no interest. As was said by the learned trial judge,—the right which accrued to Vosper under the breaches of the covenants of warranty found in the Donohue deed was a mere right of motion for damages for the breach up to the time that Donohue acquired title under the deed to him from the Keweenaw Association, which right of

154 action it is not claimed was transferred to the Keweenaw Association by the operation of the decree.

The effect of the decre then was to oust Vosper from the land, of which he had the actual or constructive possession of an undivided quarter interest,—it appearing that Michael Donohue continued in

possession of the undivided one-half of the claim from the time of his original entry until his quitclaim deed to the complainant, despite the alleged trespasses of the canal company and its successor, which possession would inure to Vosper under the warranty deed. (For it must be said that Donohue was holding possession under Vosper after December 29, 1894, of the undivided quarter interest). The decree established a paramount title in a third party, and thus evicted Vosper from his title and possession in the undivided quarter. This is important because Vosper must show an eviction before he can claim the remedy of an estoppel by the covenant of warranty in his deed. See Matteson v. Vaughan, 38 Mich. 373; Rawle on Covenants for Title (5th ed.) §§131-140.

It thus becomes a clear case for the application of the doctrine of estoppel by warranty in Vosper's favor. The rule is that a grantor who assumes to convey property by warranty deed when the title is in a third person, will, together with his subsequent grantees with notice, be estopped from setting up against the first grantee an after-acquired title. The American courts have uniformly held that the after-acquired estate passes by direct operation of law, without the intervention of any court or the aid of a suit in equity
155 or action at law on the covenants, to the covenantee. See Rawle, supra, §248; Maupin on Marketable Title to Real Estate (2d ed.) §213. This doctrine has received the approbation of this court. Lee v. Clary, 38 Mich. 226; Fisher v. Hallock, 50 id. 465; Pfirrman v. Wattles, 86 id. 258. Therefore, whatever title Michael Donohue acquired by the quitclaim deed from the Keweenaw Association on November 19, 1896, passed directly to Vosper, unless the complainant can be said to be a subsequent purchaser in good faith without notice. This brings us to a discussion of the third contention of the complainant.

(3) Under the decisions of this court, one who takes by quitclaim takes with notice of defects in his grantor's title and subject to previous unrecorded warranty deeds. Peters v. Cartier, 80 Mich.. 129; Beakley v. Robert, 120 id. 210; Hoffman v. Simpson, 121 id. 502; Messenger v. Peter, 129 id. 93; Zeigler v. Valley Coal Co., 150 id. 82; Backus v. Cowley, 162 id. 592; Pellow v. Arctic Iron Co., 164 id. 87; Walker v. Schultz, 175 id. 282.

Counsel for complainant contends that, assuming that the deed as recorded was not constructive notice to the complainant when
156 he made his purchase, by reason of a defective record, Act 199 of 1915 has changed the rule that has obtained for many years in this State relative to the standing of a grantee in a quitclaim deed, and it is his claim that the act merely establishes a new rule of evidence, which is applicable to cases arising before the act took effect as well as since. Act. No. 199 P. A. 1915 provides as follows:

"Every conveyance of real estate within the State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first re-

corded conveyance is in the form or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

It is an amendment of section 8988 C. L. 1897, which read as follows:

"Every conveyance of real estate within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

We are of the opinion that the language of the amendment does not indicate that it was contemplated by the legislature that it should affect conveyances already made. The language is

"The fact that such recorded conveyance is in the form or contains the terms of a quitclaim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

157 It is a rule that an act of the legislature is not to be construed as retroactive unless it affirmatively or clearly appears from the act itself that such was the intention. Smith v. Humphrey, 20 Mich. 398; Fuller v. Grand Rapids, 40 id. 395; Maxwell v. Bay City Bridge Co., 46 id. 278, 287; Phillips v. Township of New Buffalo, 68 id. 217, 219; In re Lambrecht, 137 id. 450, 453; Davis v. Michigan Central R. Co., 147 id. 479. And in our opinion it cannot be said that the act in question clearly states or necessarily implies that it is to have a retroactive effect, but rather the implication is to the contrary. We do not think it was the intention of the legislature to unsettle long established titles, which the other construction contended for by the complainant might cause.

(5) The last contention of the complainant's counsel is that the complainant and his grantor, Michael Donohue, had been in possession for more than fifteen years, and therefore Vosper's title is barred. With reference to this, there is no contention between counsel as to the soundness of the legal propositions advanced by complainant, viz., that a grantor may obtain title against his grantee and a tenant in common against his co-tenant by adverse possession. The contention of counsel for the defendants is that while these legal propositions are well grounded, it is also true that before a tenant in common may acquire a title against his co-tenant by adverse pos-
158 session, the proofs must be clear and cogent, and the case cannot be made out by inference. Yelverton v. Steele, 40 Mich. 538, Campau v. Campau, 44 id. 32, is cited, where it is held by this court that

"such exclusive claim and denial of their right should be clear and unambiguous and brought home to the knowledge of the co-tenants either by express notice, or by implication. And if the latter, all doubt growing out of the nature and character thereof, should be against an ouster. The presumption should be that the tenant in

possession respects and recognizes the rights of his cotenants, until the contrary clearly appears; that the possession is rightful, and not to the exclusion of others having equal rights."

See also Rich v. Victoria Copper Mining Co., 147 Fed. 380.

The reason for this rule, in our opinion, is apparent, because the possession itself is rightful and does not import adverse possession, as would that of a stranger. So that the presumption of occupation as a co-tenant must be overcome by acts and declarations which are clearly inconsistent therewith and which are brought home to the co-tenant. Michael Donohue, at the time of his deed to Vosper, was in possession. He then conveyed to Vosper an undivided quarter and remained in possession. Martin Donohue was living with his brother at the time, and after he received the deed from Michael in December 1896 he continued to remain there, his possession being of the same nature as that of Michael, which continued until the execution of the mining lease. Since that time the complainant has resided upon and farmed a portion of the land, being permitted
159 to do so by the terms of the mining lease so long as his occupancy did not interfere with the mining operation.

In 1908, an application having been made for a mining option on the land, Martin Donohue claims to have first heard that Vosper claimed to have a deed from Michael Donohue of an interest in the land. He then claimed that no such deed had been made, and that he had received a letter from his brother denying that he had made any such deed. This was his first denial of Vosper's rights. But it seems to us that if he denied Vosper's title, he could not consistently join with Vosper in executing an option for a lease and the lease itself, unless it should be by an agreement which denied Vosper's rights. It was the opinion of the circuit judge—in which we concur—that it would be absurd to hold under the proofs in this case that during the period from the execution of the deed to Vosper, to the delivery of the Keweenaw Association deed to Michael, the latter was holding adversely to Vosper, or that Vosper knew or believed or had the slightest reason to suspect that Donohue repudiated his rights under his deed. During this period the things which were done on or concerning the land by complainant were as consistent with a full recognition of Vosper's title as the contrary. And until shortly before the execution of the option in 1908, no notice, actual or by implication, that the quarter interest in controversy was claimed by either Michael or the complainant, was brought
160 home to Vosper. In any event, the running of the statute was arrested by the recognition of Vosper's and Abbott's titles by the execution of the option in December 1908, which was repeated in March 7, 1910, by the execution of the lease therein provided for.

The case of Houlihan v. Fogarty, 162 Mich. 492, is cited by complainant's counsel, but we think that case is readily distinguishable from the situation here presented. In that case the effect of a recital or admission of title in the lease on the running of the statute was not involved nor decided.

When Martin Donohue, in the instrument above referred to, acknowledged that he was holding possession subject to the titles of Vosper and Abbott, it is urged with reason that they had no occasion to commence any suit, as such conduct on the part of the complainant would reasonably lead them to the belief and conviction that such adverse claims had been abandoned.

We are therefore of the opinion that there is no merit in the complainant's claim of adverse possession.

The decree of the lower court in dismissing the bill of complaint and quieting the title of the defendants Vosper, Abbott, and Tonkin as prayed for in the crossbill, will therefore be affirmed, with
161 costs to the defendants.

[Seal of the Supreme Court of Michigan, Lansing.]

(Signed) FRANZ C. KUHN.
FLAVIUS L. BROOKE.
ROLLIN H. PERSON.
J. W. STONE.
JOHN E. BIRD.
J. W. STEERE.
JOSEPH B. MOORE.
RUSSELL C. OSTRANDER.

Endorsed: Filed December 21, 1915. Chas. C. Hopkins, Clerk Supreme Court.

162 At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-first day of December in the year of our Lord one thousand nine hundred and fifteen.

Present, the Honorable

Flavius L. Brooke, Chief Justice.
Aaron V. McAlvay,
Franz C. Kuhn,
John W. Stone,
Russell C. Ostrander,
John E. Bird,
Joseph B. Moore,
Joseph H. Steere,
Associate Justices.

No. 26707.

MARTIN DONOHUE, Complainant and Appellant,
vs.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, BUFFALO IRON MINING COMPANY, a Corporation, Defendants.

This cause having been brought to this Court by appeal from the Circuit Court for the County of Iron, in Chancery, and having

been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the County of Iron, in Chancery, be and the same is hereby in all things Affirmed. And it is further ordered, adjudged and decreed that the defendants do recover of and from the complainant their costs to be taxed.

163 In the Supreme Court of the United States of America.

In Equity.

MARTIN DONOHUE, Plaintiff in Error,
v.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN and BUFFALO IRON MINING COMPANY, Defendants in Error.

Petition for Writ of Error to the Supreme Court of the State of Michigan.

Petition.

And now comes the plaintiff in error, Martin Donohue, and respectfully represents to the Court:

1st. That he is a resident of the Village of Iron River, in the County of Iron and State of Michigan, and that on the 21st day of December, 1915, a decree was entered in a certain suit then pending in the Supreme Court of the State of Michigan, that being the highest court of said State in which a decision in said suit could be had, in which said suit your Petitioner was Complainant and the above named defendants in error were defendants.

2nd. That in said suit there was drawn in question, the validity of a statute of the United States of America, to-wit, the validity of an Act of Congress approved July 3rd, 1866, and in which said suit there was also drawn in question the validity of an authority exercised under the United States, to-wit, the validity of certain decrees of the United States Circuit Court for the Western District of Michigan, entered on the 17th day of November, 1896, in certain causes wherein the United States of America was complainant, and the Lake Superior Ship Canal Railroad Iron Company, The Keweenaw Association, Ltd., Metropolitan Lumber Company, and W. D. Wing Company, Ltd., were defendants and wherein

164 The Lake Superior Ship Canal Railway Iron Company and The Keweenaw Association, Ltd., were complainants in a cross bill and the United States of America, and others, were defendants in a cross bill, and that the decision of the Supreme Court of the State of Michigan in said suit in which said decree was entered on the 21st day of December, 1915, is against the right, title and privilege, especially set up and claimed by yc r Petitioner as complainant in said cause, under such Statute, and under said authority, all of which will appear more in detail from the assignment of error filed with this petition.

Wherefore, your Petitioner prays that a Writ of Error may issue to the Supreme Court of the State of Michigan, for the correction of the errors complained of and that a duly authenticated transcript of the record and proceedings and papers therein may be sent to the Supreme Court of the United States.

That your Petitioner presents herewith a certified copy of the opinion of the Supreme Court of the State of Michigan and of the Decree entered in said cause, together with a certified copy of the printed record in said cause in said court.

MARTIN DONOHUE,
By A. H. RYALL,
His Agent and Attorney in Fact.

A. H. RYALL,
Attorney for Petitioner.

Business Address: Room 206 First Nat'l Bk. Bldg., Escanaba, Michigan.

165*a* UNITED STATES OF AMERICA, *ss:*

To Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and The Buffalo Iron Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein Martin E. Donohue is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

165-*b* UNITED STATES OF AMERICA, *ss:*

To Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and The Buffalo Iron Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein Martin E. Donohue is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the

Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

(Signed) MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

On this 23*th* day of March, in the year of our Lord one thousand nine hundred and sixteen (1916), personally appeared Charles McFarland, before me, the subscriber, a Notary Public in and for said county, and makes oath that he delivered a true copy of the within citation to E. C. Bowers an officer and agent of the defendant, Buffalo Iron Mining Company, to-wit, its Superintendant at the Village of Iron River, Michigan.

CHARLES McFARLAND.

Sworn to and subscribed the 23d day of March, A. D. 1916.

[Seal Frank C. Smart, Notary Public, Iron County, Mich.]

FRANK C. SMART,
Notary Public, Iron County, Michigan.

My Commission expires Sept. 22, 1919.

Fees, $3.75.

165-*c* UNITED STATES OF AMERICA, *ss:*

To Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and The Buffalo Iron Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Martin E. Donohue is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

(Signed) MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

I hereby acknowledge service of the citation of which the within and foregoing is a true copy on behalf of the defendants in error, Benjamin Vosper, Fred H. Abbott and Maurice J. Tonkin.

Dated this 25th day of March, 1916.

DAN H. BALL,
Att'y for said Def'ts Vosper, Abbott and Tonkin.

166 (Copy.)

Know all Men by these Presents, that we, Martin Donohue of Iron River, Michigan, as principal, and Michael T. Sullivan and William Moss, as sureties, are held and firmly bound unto Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and Buffalo Iron Mining Company, a corporation, in the full and just sum of Five Hundred ($500.00) dollars, to be paid to the said Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and Buffalo Iron Mining Company, a corporation, and their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of February, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the Supreme Court of the State of Michigan, at the City of Lansing, Michigan, in a suit depending in said Court, between Martin Donohue, as Complainant, and Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and Buffalo Iron Mining Company, a corporation, as Defendants, a decree was rendered against the said Martin Donohue and the said Martin Donohue, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and Buffalo Iron Mining Company, a corporation, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Martin Donohue shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MARTIN E. DONOHUE. [SEAL.]
MICHAEL T. SULLIVAN. [SEAL.]
WILLIAM MOSS. [SEAL.]

Sealed and delivered in presence of—
CLARENCE E. LOTT.
EDWARD P. LOTT.

Approved by—
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

STATE OF MICHIGAN,
County of Iron, ss:

Michael T. Sullivan and William Moss sureties on the within bond, being each duly sworn, say that they are each worth the sum

of Five Hundred ($500.00) Dollars, over and above all liabilities and exemptions.

MICHAEL T. SULLIVAN.
WILLIAM MOSS.

Subscribed and sworn to before me this 1st day of March, 1916.
[SEAL.] EDWARD P. LOTT,
Notary Public in and for said County and State.

My Commission expires Jan. 10, 1920.

167 In the Supreme Court of the United States of America.

In Equity. Petition for Writ of Error to the Supreme Court of the State of Michigan.

MARTIN DONOHUE, Plaintiff in Error,
v.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, and BUFFALO IRON MINING COMPANY, Defendants in Error.

Assignments of Error.

To the Honorable the Justices of the Supreme Court of the United States:

And now comes Martin Donohue, the above named plaintiff in error, and respectfully represents:

1st. That he is a resident of the Village of Iron River, and County of Iron and State of Michigan.

2nd. That as Complainant he heretofore filed a bill in the Circuit Court for the County of Iron, in the State of Michigan, in Chancery, against Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and the Buffalo Iron Mining Company as defendants, wherein amongst other things, this plaintiff in error claimed that he was the owner of an undivided 1/4th interest in certain premises described in the Bill of Complaint therein, by virtue of the provisions of an Act of Congress approved July 3rd, 1866, and by virtue of a decree of the Circuit Court of the United States for the Western District of Michigan, Southern Division, in Equity, in a certain cause wherein the United States of America was complainant, and the Lake Superior Ship Canal Railroad Iron Company, the Keweenaw Association, Ltd., Metropolitan Lumber Company, and W. D. Wing Company, Ltd., were defendants, and wherein The Lake Superior Ship Canal Railway Iron Company and the Keweenaw Association, Ltd., were complainants in a cross bill, and the United States
168 of America, and others, were defendants in a cross bill.

2nd. That said suit so commenced by this plaintiff in error in the said Circuit Court for the County of Iron, and State of Michigan, in Chancery, came on for hearing in said court, and that a decree was entered therein on November 27th, 1914, and that said cause was appealed from said Circuit Court for the County of Iron

to the Supreme Court of the State of Michigan, and was there heard and decided by said Supreme Court, and that on the 21st day of December, 1915, a final decree was entered in the Supreme Court for the State of Michigan, in said suit, and that said Supreme Court of the State of Michigan is the highest court of the State of Michigan, in which a decision in said suit could be had, and that by said final decree there was drawn in question the validity of the said Act of Congress of July 3rd, 1866, and of the authority exercised under the United States by virtue of said decree of November 17th, 1896, in said Circuit Court of the United States for the Western District of Michigan, hereinbefore referred to, and that the decision of the Supreme Court of the State of Michigan is against the right, title and privilege especially set up and claimed by this plaintiff in error under said Statute and under said authority of said decree.

3rd. And this plaintiff in error prays for a Writ of Error to issue from this Honorable Court to the said Supreme Court of the State of Michigan, and assigns as errors in the record of said proceedings and judgment in the Supreme Court of the State of Michigan, the following, to-wit:

That the said Supreme Court of the State of Michigan was in error in holding and deciding that the said Statute of July 3rd, 1866, and the said decree of the United States Circuit Court for the Western District of Michigan, Southern Division, dated November 17th, 1896, did not fully and effectually vest in the remote grantors of this plaintiff in error, to-wit, the Keweenaw Association, Ltd., a full, perfect and complete title in said lands described in said
169 bill of complaint, and thereby extinguish and cut off all the right, title and interest of the said defendant, Benjamin Vosper, and of his grantees and persons claiming thru him, to-wit, the defendants, Fred H. Abbott, Maurice J. Tonkin, and Buffalo Iron Mining Company, in and to said premises, and every part thereof, so that by virtue of the mesne conveyances set up and referred to in said bill of complaint, this plaintiff in error would and did acquire an absolute and perfect title to said premises to the exclusion of the said defendants in error herein.

Wherefore, the said plaintiff in error says that the said decree of the Supreme Court of the State of Michigan is erroneous, and should be reversed.

A. W. RYAN,
Attorney for Plaintiff in Error.

170 In the Supreme Court of the United States of America.

In Equity.

MARTIN DONOHUE, Plaintiff in Error,
vs.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, and BUFFALO IRON MINING COMPANY, Defendants in Error.

Petition for Writ of Error to the Supreme Court of the State of Michigan.

Order Allowing Writ of Error.

And now comes the plaintiff in error by his attorney, and files and presents to the Court his petition, praying for the allowance of a Writ of Error intended to be urged by him, together with certain assignments of error, alleged to have been committed in the decision of said cause by the Supreme Court of the State of Michigan, and praying further that a duly authenticated transcript of the records and proceedings and papers upon which decree rendered by the said Supreme Court of the State of Michigan, on the 21st day of December, 1915, in said cause, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the premises, It Is Ordered, that said writ of error be allowed, Provided However, that said plaintiff in error give a bond according to law, in the sum of $500 to answer to said defendants in error for all costs if he fail to make his appeal good, but which said bond shall not operate as a supersed-as or stay of execution.

Dated at Washington, D. C., this 23 day of February, 1916.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

171 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Martin E. Donohue, Appellant, and Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and The Buffalo Iron Mining Company, Appellees, wherein was drawn in question the validity of a treaty of a statute of, or an authority exercised under, the

United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Con-
172 stitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Appellant, Martin E. Donohue, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of Supreme Court of State of Michigan,

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. October term, 1915. Martin E. Donohue, Plaintiff in Error vs. Benjamin Vosper, et al. Writ of Error.

To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of Record hereto annexed.

Capitol, Lansing, Michigan, April 3, 1916.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of Supreme Court of State of Michigan.
By JAY MERTZ,
Deputy Clerk of Supreme Court of State of Michigan.

173 STATE OF MICHIGAN:

Supreme Court.

MARTIN E. DONOHUE, Plaintiff in Error,
vs.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN and THE BUFFALO IRON MINING COMPANY, Defendants in Error.

IN THE SUPREME COURT, *ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the Writ of Error, the Writ of Error, with allowance endorsed thereon, the citation, with proof of service, and acceptance of service endorsed thereon by the attorney for the adverse party, a copy of the bond duly approved, together with the assignments of error in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this third day of April, in the year of our Lord, one thousand nine hundred and sixteen.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of Supreme Court of Michigan.
By JAY MERTZ,
Deputy Clerk of Supreme Court of Michigan.

174 UNITED STATES OF AMERICA:

In the Supreme Court.

MARTIN E. DONOHUE, Plaintiff in Error,
vs.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, and BUFFALO IRON MINING COMPANY, Defendants in Error.

In accordance with the provisions of Section 9, Rule 10 of said Court, the Plaintiff in Error, does hereby state that the points on which he intends to rely in this Court, are those arising out of the construction of the decrees of the United States Circuit Court for the Western District of Michigan, dated November 17th, 1896, and April 19th, 1905, and the subsequent conveyances from the Keweenaw

Association, Limited, and its successors in title, to Michael Donohue, and that the parts of the record which Appellant thinks necessary for the consideration thereof, consists of the entire printed record in said cause as prepared for the Supreme Court of the State of Michigan, excepting the following portions thereof, which plaintiff in error disignates to be omitted from the printed record in this Court:

All of the testimony of the witnesses, Jesse Allen, Frank Jackson and Patrick O'Brien, appearing on pages 103 to pages 113 of the printed record.

All of the testimony of the witnesses, Fred H. Abbott, appearing on pages 129 to 131 of the printed record.

The stipulations on pages 140 to 141 of the printec record, and the certificate on page 142 of the printed record.

And the plaintiff in error requests that the portions herein designated be omitted from the printed record in this cause.

175 Dated this 19th day of April, A. D., 1916.

W. P. BELDEN,
A. H. R.,
Att'y- for Plaintiff in Error.

To Dan H. Ball, Att'y for Def'ts in Error:

You will Please Take Notice that the foregoing is a true copy of the statement and designation of portions of the record to be printed in the above entitled cause.

W. P. BELDEN,
Att'y for Plaintiff in Error.

STATE OF MICHIGAN,
County of Delta, ss:

A. H. Ryall, being duly sworn, says that on the 22nd day of April, 1916, he served a copy of the foregoing statement and designation of portions of record to be printed, upon D. H. Ball, Attorney for the defendants in error, by inclosing said copy in an envelope addressed to the said D. H. Ball, at Marquette, Michigan, and by depositing said envelope with said document therein in the United States mail with postage thereon fully prepaid.

A. H. RYALL.

Subscribed and sworn to before me this 22nd day of April, 1916.

[Seal Mary A. McGraw, Notary Public, Delta County, Michigan.]

MARY A. McGRAW,
Notary Public, Delta County, Mich.

My Commission Expires March 28th, 1918.

[Endorsed:] 952/25235. United States of America. In the Supreme Court. Martin E. Donohue, Plaintiff in Error, vs. Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and Buffalo Iron

Mining Company, Defendants in Error. Designations of Portions of Record to be printed. A. H. Ryall, Attorney, Escanaba, Michigan.

176 [Endorsed:] File No. 25235. Supreme Court U. S., October term, 1915. Term No. 952. Martin E. Donohue, Pl'ff in Error, vs. Benjamin Vosper et al. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed April 24, 1916.

177 UNITED STATES OF AMERICA:

Supreme Court, October Term, 1916.

No. 445.

MARTIN E. DONOHUE, Plaintiff in Error,
v.
BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN, and the BUFFALO IRON MINING COMPANY, Defendants in Error.

The said defendants in error, by Dan H. Ball, their attorney, say that the statement filed by the attorney for the plaintiff in error, bearing date April 19th, 1916, and setting forth the parts of the record which he thinks necessary to be printed, is not a "statement of the errors on which he intends to rely," as required by Section 9 of Rule 10; so that the said defendants in error are unable to determine what parts of the record are necessary for the consideration thereof, and that said statement is insufficient under the requirements of said rule.

Dated June 22, A. D. 1916.

DAN H. BALL,
Attorney for Defendants in Error.

SIR: Take notice that the foregoing objections to the sufficiency of your statement of errors on which you intend to rely, has been forwarded to the Clerk of the Supreme Court of the United States for filing.

Dated June 22, A. D. 1916.

Yours, etc.,

DAN H. BALL,
Attorney for Defendants in Error.

To A. H. Ryall, Esq., Attorney for Plaintiff in Error.

177½ STATE OF MICHIGAN,
County of Marquette, ss:

Harvey Burright Hatch, being duly sworn, says that he did, on the 23rd day of June, A. D. 1916, serve a copy of claim of insufficiency of designation of portions of record to be printed, and notice of filing same, of which the annexed is a true original copy, upon A. H. Ryall, Esquire, attorney for the plaintiff in error, therein

named, by depositing the same in the post office at Marquette, Michigan, inclosed in a sealed envelope addressed to said Ryall at Escanaba, Michigan, that being the place of residence and business address of record of said Ryall, and that full legal postage was prepaid on said document and envelope.

HARVEY BURRIGHT HATCH.

Subscribed and sworn to before me this 23rd day of June, A. D. 1916.

[Seal Frank H. Bertal, Notary Public, Marquette Co., Mich.]

FRANK H. BERTAL,
Notary Public in and for said County of Marquette and State of Michigan.

My commission expires April 25, 1918.

[Endorsed:] 445—'16/25235. No. 445, Oct. Term, 1916. The Supreme Court of the United States. Martin Donahue, Plaintiff in Error, vs. Benjamin Vosper et al., Defendants in Error. Claim of Insufficiency of Designation of Portions of Record, Notice & Proof of Service. Dan H. Ball, Att'y for Defendants, Business Address, Marquette, Mich.

178 [Endorsed:] File No. 25235. Supreme Court U. S., October term, 1916. Term No. 445. Martin E. Donahue, Pl'ff in Error, vs. Benjamin Vosper et al. Statement of counsel for the defendants in error in relation to designation by counsel for the plaintiff in error of parts of record to be printed, and proof of service of same. Filed June 26, 1916.

Endorsed on cover: File No. 25,235. Michigan Supreme Court. Term No. 445. Martin E. Donohue, plaintiff in error, vs. Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and The Buffalo Iron Mining Company. Filed April 11th, 1916. File No. 25,235.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. [redacted]5.445

MARTIN E. DONAHUE, PLAINTIFF IN ERROR,

vs.

BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN and THE BUFFALO IRON MINING COMPANY.

In Error to the Supreme Court of Michigan.

MOTION TO DISMISS OR AFFIRM.

DAN H. BALL,
Attorney for Defendants in Error.

(25,235)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

Martin Donahue, *Plaintiff in Error,* vs. Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and the Buffalo Iron Mining Company, *Defendants in Error.*	No. 445 In Error to the Supreme Court of Michigan.

I.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM DECREE.

Now come the defendants in error above named, by Dan H. Ball their attorney of record herein, and in this Honorable Court:

1. To dismiss the writ of error herein, on the ground that this court has no jurisdiction thereof, because no Federal question is involved therein.

2. To affirm the decree of the Supreme Court of the state of Michigan, on the ground that it is manifest

that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depends are so frivolous as to require no argument.

I refer to the printed record on file in this cause.

DAN H. BALL,
of Marquette, Michigan.
Attorney of Record for Defendants in Error.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendants in error will on the 13th day of November, A. D. 1916, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, herto attached, referring to the printed record heretofore filed in said cause, all of which are now served upon you herewith.

Dated Oct. 17th, 1916.

DAN H. BALL,
of Marquette, Michigan.
Attorney of Record for Defendants in Error.

To A. H. RYALL, Esq.
Attorney for Defendants in Error.
Escanaba, Mich.

II.

PLEADNIGS.

The plaintiff in error, who was also plaintiff below, filed his bill to declare and quiet his title to an undivided

one-fourth interest in the west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (23), in township forty-- three (43) north, of range thirty-five (35) west, in the Upper Peninsula of Michigan, as against the claims of the defendant Benjamin Vosper, and others to whom he had conveyed portions of said interest.

By the bill the plaintiff alleges as follows:

1. That he is the owner in fee simple of the the lands above described and is in possession. Record, page 1, Par. 1.

2. That said lands were conveyed by the State of Michigan to a corporation known as the Lake Superior Ship Canal, Railway and Iron Company by certain documents June 25th, 1875. Record, page 1, Par. 2.

3. That said corporation, on the 8th of April, 1891, conveyed said lands to the Keweenaw Association Limited, (a partnership association,) which Association, on the 28th of August 1908, conveyed all said property to the Keweenaw Land Association Limited, (a similar association,) and that said Keweenaw Land Association Limited, on the 21st of October 1909, conveyed said premises to Michael Donahue, and that said Michael Donahue and his wife subsequently conveyed said premises to the plaintiff, and that by reason of the premises the plaintiff became vested with the full legal title thereto. Record, pages 1-2, Par. 3-4 & 5.

4. That about 1884 said Michael Donahue entered into posession of said lands, claiming the right to locate them as a homestead under the laws of the United States, and that he did everything required by the homestead laws, residing on the land, making proof of residence, etc. That his right to homestead was contested by the Lake Superior Ship Canal, Railway and Iron Company, and other

persons claiming under it, and thereupon certain suits in equity were brought in the United States Circuit Court for the Western District of Michigan, in which the United States of America was complainant, and the Lake Superior Ship Canal, Railway and Iron Company, Michael Donahue and others, were defendants, for the purpose of testing the title of said Michael Donahue to said property. Record, page 2, Par. 6.

5. Pending said litigation a deed was placed on record, purporting to have been executed by said Michael Donahue to the defendant Benjamin Vosper, purporting to convey an undivided one-fourth interest in the land to said Vosper. Record, page 2, Par. 6.

6. That said deed was not in fact executed by said Michael Donahue. Record, page 3, Par. 7.

7. That subseqnently a cross bill, and supplemental cross bill, were filed by the said Lake Superior Ship Canal, Railway and Iron Company and the Keweenaw Association Limited, against the United States, Michael Donahue, and others, as defendants, in the suit above mentioned, which had been instituted by the United States, and it was prayed by said cross bill and supplemental cross bill that the title to said land be decreed to be in the said Keweenaw Association Limited, and that said title be quieted as against said Michael Donahue, Benjamin Vosper and the United States. Record, page 3, Par. 8.

8. That said suits in equity were brought to hearing on the said bill of complaint, answer, cross bill, and supplemental cross bill, and upon the hearing the United States, Michael Donahue and Benjamin Vosper withdrew a demurrer they had interposed to said cross bill, and consented in open court to the entry of a decree against them as to their title, and that thereupon the court, hav-

ing jurisdiction of the subject matter and the parties, and having full authority and jurisdiction to pass upon the title of said parties, did enter a decree, (of which a copy is attached, See p. p. 9 to 12) whereby it was determined that the title to said premises at the time of the filing of the bill by the United States, to-wit, December 18th, was completely vested in the Lake Superior Ship Canal, Railway and Iron Company, in part satisfaction of a grant to the state of Michigan by act of Congress of July 3, 1866 and has, since the commencement of the suit, become, and was at the date of the decree, fully vested in the said Keweenaw Association Limited and that neither the United States, nor the defendants Donahue and Vosper, had any right, title or interest therein, and that said decree, in addition thereto, did forever quiet the title to said premises in said Keweenaw Association Limited as against the United States and every one of said defendants, including the defendants Donahue and Vosper; and that said decree further provided that it should operate as a release and conveyance from the United States and from each of the said defendants in said cross bill and supplemental cross bill, including the defendants Michael Donahue and Benjamin Vosper, of all claim, right, title or interest in or to said lands. Record, pages 3-4, Par. 9-10.

9. The bill further alleges that by virtue of said decree, and of the conveyances above set forth, the Keweenaw Association Limited, at the date of the conveyance to Michael Donahue, (which was said to be on the 2nd day of October 1909,) was the absolute owner of said premises, and that neither said Michael Donahue nor said Benjamin Vosper then had any title in or to said premises and that therefore, by the deed above mentioned, a full, complete and absolute title to the premises became vested in said Michael Donahue, which title, by the subsequent

conveyance from Michael Donahue to the plaintiff, became fully vested in the plaintiff. Record, page 4, Par. 11.

10. That, although the alleged deed from Michael Donahue to Benjamin Vosper was void, yet, having been recorded, it cast a cloud upon the title of the plaintiff. Record, page 4, Par. 12.

11. That at the time of the conveyance from Michael Donahue to Benjamin Vosper, (which was in December 1894,) Donahue was claiming the land under the homestead law of the United States and that said conveyance, if executed, was illegal and contrary to the laws of the United States, for which reason, it is alleged that Vosper cannot assert, under the covenants of warranty in the deed, or otherwise, any rights against Michael Donahue, or his grantee, by way of estoppel, or otherwise, because the deed, if executed, was in itself illegal and void and contrary to the laws of the United States. Record, pages 4-5, Par. 13.

12. Plaintiff further alleges title by adverse possession. Recodr, pages 5-6, Par. 14-15-16.

13. That on the 7th of March 1910, a lease of said land for mining purposes, to a corporation known as the Niagara Mining Company, for a term of thirty years, was executed by the plaintiff, and by the defendants Vosper and others to whom Vosper had conveyed portions of his undivided one-fourth interest. Record, page 6, Par. 19.

And that under said lease one-quarter of the royalties thus far accruing have been paid to said Vosper, Abbott and Tonkin; as follows: to Vosper, one-eighth; to Fred H. Abbott, three thirty-seconds, and to the said Maurice J. Tonkin, one thirty-second thereof. Record, pages 6-7, Par. 21.

The bill prays, among other things, that the deed from Michael Donahue to Benjamin Vosper, and the subse-

quent deeds from Vosper to the other defendants, be declared null and void, and that plaintiff be decreed to be the absolute owner in fee simple of the land. Record, page 8.

A copy of the decree of the Circuit Court of the United States for the Western District of Michigan, referred to in the said bill, is annexed to the bill as an exhibit. Record, pages 9-12.

ANSWER.

The answer of the defendants denies all right of the plaintiff to said one-fourth interest in the land. Page 12, Par. 1.

Admits that the Lake Superior Ship Canal, Railway and Iron Company became the owner in fee simple of the said lands prior to the year 1890, and that said company, about the time mentioned in the bill (April 8, 1891) conveyed said premises to the Keweenaw Association Limited, but denies that the Keweenaw Association Limited at any time conveyed said land to the Keweenaw Land Association Limited, but states that in the month of November, 1896 the Keweenaw Association Limited conveyed the land by deed to said Michael Donahue, and that Michael Donahue about the month of December, by quit claim deed, conveyed all the right, title and interest which he had in the land, to the plaintiff Martin Donahue. Record, pages 12-13, Par. 2-3.

Admits that the claim of Michael Donahue to obtain said land under the homestead or pre-emption laws of the United States was contested by Lake Superior Ship Canal, Railway and Iron Company, and also by the Keweenaw Association Limited. Pages 13-14, Par. 6.

Admits the pendency of the litigation alleged in the bill, but alleges that prior to the entry of the decree mentioned therein, and about the 17th of November 1896, a decree

was entered in said cause by consent of all the parties, including Michael Donahue, upon the cross bill mentioned, whereby it was adjudged that at and before the commencement of the suit by the United States, the Lake Superior Ship Canal, Railway and Iron Company was the owner in fee simple of the land described in the bill, and other lands, and that at the time of the entry of the decree the Keweenaw Association Limited was the owner thereof, and by said decree the title of the Keweenaw Association Limited was forever quieted as against the said Michael Donahue, and the other parties named in said cross bill. Record, pages 14-15, Par. 9.

Copy of said decree accompanies the answer as an exhibit. Record, pages 21-23.

Admits that by the decree of November 17, 1896 the title of the Keweenaw Association Limited was confirmed and quieted and that it was adjudged that the Keweenaw Association Limited was the owner in fee simple of the lands; Page 15, Par. 11.

Denies that the Keweenaw Association, Ltd., ever conveyed the land to the Keweenaw Land Association, Ltd., and that the last named association ever conveyed the same to Michael Donahue, but alleges that the deed referred to as having been made by said Keweenaw Land Association Ltd., dated October 2, 1909 was not a conveyance to said Michael Donahue, but was a disclaimer of title and quit claim of any possible interest, right or title, the said Keweenaw Land Association, Ltd., may then have been supposed to have, to the several parties to whom the said Michael Donahue had before then executed deeds purporting to convey the said lands, and they denied that either Michael Donahue or the Association acquired any other or additional interest in said land by virtue of the deed of October 2, 1909 than they already had,

which was not to exceed the undivided 3-4 thereof. (Record page 15, Par. 11.)

Admits that at the time of the execution of the deed from Michael Donahue to Benjamin Vosper, Donahue had no record title to the premises but he was claiming, not merely the right to enter the land under the pre-emption laws of the United States, but was claiming to be the owner thereof, by virtue of alleged occupancy under and by virtue of an act of Congress approved March 2, 1889, which he claimed had confirmed his claim of title thereto.

Admits that Donahue had attempted to enter the land under the laws of the United States, claiming that the same were public lands of the United States but that the right to make such entry was contested by the Lake Superior Ship Canal, Railway and Iron Company and the Keweenaw Association Limited.

Denies that any interest in said lands was in fact public lands of the United States, or that the United States had any interest whatever in said lands, at the time said deed was given, or that they were subject to entry;

And denies that the conveyance to Vosper was illegal. Record, pages 15-16, Par. 13-14.

The answer then sets forth the controversy and litigation between the United States and the defendants by bill and cross bill, the execution by Michael Donahue to Vosper on the 29th of December 1894 of a warranty deed of the undivided one-fourth interest in said premises, the entry of the decree in favor of the Keweenaw Association Limited and against the United States, and against said Michael Donahue and Benjamin Vosper, by the Circuit Court of the United States for the Western District of Michigan on the 17th of November, 1896; claims the benefit of a cross bill under the Michigan practice, and prays

that the bill of complaint be dismissed, and that it be decreed that the defendants Vosper, Abbott and Tonkin were the owners of the undivided one-fourth interest in fee simple, and that their title be quieted as against the plaintiff and all persons claiming under him. Record, pages 17 to 21.

III.

FACTS.

The only facts really necessary to the determination of this motion are as follows:

On and before the 18th of November, 1890 the Lake Superior Ship Canal, Railway and Iron Company was the absolute owner in fee simple of the lands above described. This was determined and settled by the decree of the Circuit Court of the United States for the Western District of Michigan, in equity, November 17th, 1896.

Record, pages 21 to 23.

It was also determined and adjudicated by said decree that neither the United States nor Michael Donahue nor Benjamin Vosper had any right, title or interest in or to said lands, and that at the date of said decree the Keweenaw Association Limited was the absolute owner thereof.

December 29th, 1894 said Mcihael Donahue, then having no right, title or interest in the land but claiming to be the owner, executed a deed, with full covenants of warranty, purporting to convey to said Benjamin Vosper the undivided one-fourth interest in said lands, for a valuable and adequate consideration. (Finding of facts by the trial judge. Record, page 27. See also Vosper's testimony, Record, pages 60 to 64.)

For copy of deed see Record, pages 39-40.

November 19th, 1896 the Keewenaw Association Limited by quit claim deed conveyed said lands to Michael Donahue, and Michael Donahue on the 3rd day of December

1896, executed a quit claim deed of the same to the plaintiff in this suit. (Finding of facts by trial judge, Record, page 26.

The quit claim deed from the Keweenaw Association Limited to Michael Donahue was offered in evidence by the plaintiff and a statement of its substance on such offer is found in the Record, page 17, and the deed is set out in full at page 52.

The instrument referred to in the bill of complaint, paragraph 3, pages 1-2, as a conveyance from the Keweenaw Association Limited to the Keweenaw Land Association Limited, dated August 28, 1908, was a blanket deed, by which the former association conveyed to the latter all the lands owned by said Keweenaw Association Limited at the date of the deed, (Record, page 51), but about four years before that, Keweenaw Association Limited had conveyed the land in suit to Michael Donahue, and the document that is designated in the bill of complaint in the same paragraph as a deed from the Keweenaw Association Limited dated October 2nd, 1909 to Michael Donahue was merely a disclaimer and release of all claim to the land by the Keweenaw Land Association Limited to the *grantees* of Michael Donahue, given for the purpose of removing a supposed cloud on their title created by the later decree of 1905. Record, pages 49-50.

The claims of the respective parties to the lands, which were adjudicated by the U. S. Court in the litigation mentioned in the pleadings were as follows:

The Lake Superior Ship Canal, Railway & Iron Co. and subsequently the Keweenaw Association, Ltd., claimed title by virtue of the certification of lands under an act of Congress approved July 3, 1866, granting lands to the state of Michigan for the construction of a harbor and ship canal. (13 U. S. Statutes at large, 519-520. For a

statement of the certification see Record, page 69). This and other land covered by the certification had been claimed by numerous parties seeking to locate the same the pre-emption and homestead laws of the U. S., under a claim that the certification was void.

March 2, 1889, Congress deemed the certification void for the reason that at the time of said certification the lands were embraced in an old unforfeited railroad grant to the state of Michigan, made in 1856, and passed an act entitled "An act to forfeit land granted to the state of Michigan to aid in the construction of a railroad from Marquette to Ontonagon in said state." (25 U. S. Statutes at large, page 1008). The railroad grant in question was declared forfeited and the lands reverted to the U. S. and at the same time the act confirmed the selections and certification except as against bona fide homestead and pre-emption claimants whose claims were asserted by actual occupancy of the land, May 1st, 1888.

December 18th, 1890 at the instignation and for the benefit of Michael Donahue and others making similar claims, (see opinion Court Record, page 25), the United States filed a bill in the Federal Court to have the certification of lands declared void for the reason above mentioned. (Exhibit A, page 45). The defendants in their answer claimed title under the granting act of July 3, 1856 and also claimed that if the certification of said lands was void the title was nevertheless confirmed by the act of Congress, March 2, 1889 above referred to. (Exhibit F, Record pages 45-46).

The Keweenaw Asociation, Ltd., succeeded to the title of the Lake Superior Ship Canal Railway & Iron Co., and was subsequently made a party complainant to said bill, and by a cross bill set up title under the granting act aforesaid and also under the comfirmation act of Con-

gress, March 2, 1889 and prayed for a decree quieting the title. (Exhibit I, pages 46-47).

The claim, therefore, of Michael Donahue depended upon his showing in the litigation that he came within the exception of the forfeiture act of March 2, 1889. He demurred to the cross bill, but finally as recited in the decree of November 17th, 1896, withdrew his demurrer and admitted, in open court, that he had no claim or title to the land and that the absolute title to the land was, at the time of the commencement of suit, completely vested in the Lake Superior Ship Canal Railway & Iron Co., and was then entirely vested in the Keweenaw Association, Ltd., and consented to the decree. (Record pp. 21-23.)

IV.

POINTS AND AUTHORITIES.

1. In order to give this court jurisdiction it must affirmatively appear *from the record* that a right, under the constitution or laws or authority of the United States, necessary to the disposition of the case, was *specially* claimed and asserted by the plaintiff in error, before the court, at the proper time and in the proper manner, and that the decision of the state court was against such claim.

Medberry v. State of Ohio, 24 Howard, 413.
Susquehanna Boom Co. v. West Branch Boom Co., 110 U. S., 57.
Parmalee v. Lawrence, 11 Wall., 36.
Gibson v. Chouteau, 8 Wall., 314.
Sayward v. Denny, 168 U. S., 180.
Fowler v. Lamson, 164 U. S., 252.
Harding v. People of State of Illinois, 196 U. S., 78.
Mallers v. Commercial Loan & Trust Co., 216 U. S., 613.

2. Decisions founded upon general laws are not reviewable by this court.

Sayward v. Denny, 168 U. S., 180.
City and County of San Francisco v. Itsell, 133 U. S., 65.
Bausman v. Dixon, 173 U. S., 113.
Israel v. Arthur, 152 U. S., 355.
Armstrong v. Treas. of Athens Co., 16 Peters, 279-281.

3. Where the judgment of the state court rested on the principle of estoppel, no Federal question is involved.
State v. Flint & P. M. R. R. Co., 152 U. S., 363.
Israel v. Arthur, 152 U. S., 355.
County of Adams v. B. & M. R. R. Co., 112 U. S., 123.

4. A Federal question cannot be raised for the first time in the petition for writ of error and the accompanying assignment of errors.
Hare v. Rice, 104 U. S., 291-301.
Mallers v. Commercial Loan & Trust Co., 216 U. S., 613.

5. The mere assertion of a Federal right is not sufficient. Such assertion "must not be frivolous or wholly without foundation. It must have fair color of support."
Parker v. McLain, 237 U. S., 469.
Hamblin v. Western Land Co., 147 U. S., 531.
Wilson v. North Carolina, 169 U. S., 586.
New Orleans Water Works v. Louisiana, 185 U. S., 336-344.
Sawyer v. Piper, 189 U. S., 154-156.
Erie R. R. Co. v. Solomon, 237 U. S., 427.

V.

ARGUMENT.

1. The claim of a Federal question in this case first appears in the petition for a writ of error and the accompanying assignments of error. Nowhere in the

record is there any such claim as is set forth in this petition and in the assignments of error. The only assignment of error is that the court "was in error in holding and deciding that the said statute of July 3rd, 1866, and the said decree of the United States Circuit Court for the Western District of Michigan, Southern Division, dated November 17th, 1896, did not fully and effectually vest in the remote grantors of this plaintiff in error, to-wit, the Keweenaw Association Ltd., a full, perfect and complete title in said lands described in said bill of complaint, and thereby extinguish and cut off all the right, title and interest of the said defendant, Benjamin Vosper, and of his grantees and persons claiming through him, to-wit, the defendants, Fred H. Abbott, Maurice J. Tonkin and Buffalo Iron Mining Company, in and to said premises, and every part thereof, so that by virtue of the mesne conveyances set up and referred to in said bill of complaint, this plaintiff in error would and did acquire an absolute and perfect title to said premises to the exclusion of the said defendants in error herein."

There is absolutely nothing in the bill of complaint, nor in any other part of the record, whereby a claim of that kind is made, unless the opinion of the court can be called a part of the record. It is true the Supreme court of Michigan, in its opinion, says that it was urged, (on the argument of course,) that the decree should stand and operate as a "release and conveyance from the United States, Donahue and Vosper to the Keweenaw Association Limited of right and title to said land," and that Vosper's rights under the covenants of warranty passed to the Keweenaw Association Limited by the decree. Record P. 79. This was on the theory that Vosper's rights under the warranty in his deed was an interest in the land and was conveyed by the decree to the Keweenaw

Association Limited. (In the 8th line from the bottom of page 79 of the record the word "motion" should be "action.")

In regard to this contention, if it can be regarded as having been raised, we call attention, in the first place, to the bill of complaint itself. The bill contains no such claim and there was no issue of that kind before the court. Instead of setting up in the bill that at the time of the entry of that decree Vosper had an interest in the land, by virtue of his warranty, which was transferred to the Keweenaw Association Limited by the decree, the plaintiff sets up that the decree of the United States Court determined, not only that the title was fully and completely in the Keweenaw Association Limited, but that "neither the United States of America nor the defendants Michael Donahue and Benjamin Vosper had any right, title or interest therein," and that the decree quieted the title in the Keweenaw Association Limited as against the United States of America, and against Donahue and Vosper.

Paragraph 11 of Bill, Record, page 4.

The claim made and urged on the argument, referred to by the court in its opinion, not only was not made by the bill, so that there was no such question in issue, but it was absolutely inconsistent with the statement of the decree made in the bill, as above quoted, and as appears in the decree itself, a copy of which is attached to the bill. Record pages 11 and 12. The language is so perfectly plain that no construction was needed, but the plaintiff himself, in his bill, (Par. 11, Rec., page 4,) does construe that portion of the decree. It is there alleged that by virtue of that decree the Keweenaw Association Limited was the absolute owner of the premises and that neither said Michael Donahue *nor said Benjamin Vosper* had any title in or to the premises.

The proposition referred to by the court as being urged by the plaintiff on the argument, was contrary to the clear allegations of the bill. The court might have refused to consider it, for the reason that there was no such question at issue, and that the argument was contrary to the case as made by the bill.

The plaintiff, therefore, was before the court with an allegation in his bill that it was absolutely and conclusively determined by the decree of the United States Court that Vosper had no right, title or interest in the land, and claiming relief upon that ground, and nevertheless urging, *on the argument*, that the court should hold that the decree of the Federal court, notwithstanding its decision that Vosper had no right, title or interest in the land, should be *construed* as holding that Vosper *did have a right or interest in the land*, and that that right or interest was transferred to the Keweenaw Association Limited by the decree.

I submit that the proposition referred to as urged upon the court and decided by it, was not one that was before the court for decision, and was not a claim of right under authority of the United States asserted by the plaintiff at the proper time and in the proper manner.

2. The plaintiff in his assignment of error complains that the court erred in deciding that the decree of November 17th, 1896 did not vest in the Keweenaw Association Limited a perfect and complete title in the lands and thereby extinguish and cut off the right, title and interest of the defendant Vosper.

Neither the bill of the United States in that suit, nor the cross bill, sought for a decree *transferring* any title or interest.

The bill of the United States claimed that the title to the land *was* in the United States, not that it should be

transferred from any of the defendants to the United States.

The cross bill urged that the title, at the time of the commencement of the suit, *was* in the Lake Superior Ship Canal, Railway and Iron Company, and at the time of the decree *was* in the the Keweenaw Association Limited, absolutely and in fee simple, and not that any title should be transferred from either Donahue or Vosper to the Association.

The decree did not attempt or pretend to transfer any title but, as above stated, declared that there *was* no title or interest in either Donahue or Vosper, but that the entire and absolute title *was* in the Keweenaw Association Limited.

The complaint, therefore, that the court erred in deciding that the decree did not vest a complete title in the Keweenaw Association Limited and cut off any supposed right, title or interest in Vosper, complains of a decision that the court did not make. The decision was that the Association *had* an absolute title and that *neither Donahue nor Vosper had* any title or interest.

3. By the asignment of error the plaintiff draws the conclusion which he claims would have followed from the decision the court ought to have made, to-wit, "so that by virtue of the mesne conveyances set up and referred to in said bill of complaint this plaintiff in error would and did acquire an absolute and perfect title to said premises to the exclusion of the said defendants in error herein."

If the court had, (contrary to the claim set forth in the bill,) decided what the plaintiff claims it ought to have decided, that is, that the decree did vest the title in the Keweenaw Association Limited, and did cut off the right title and interest of Vosper, the conclusion drawn by the

plaintiff in his asignment of error would certainly not follow, any more than it would follow from the decision the court did actually make, to-wit, that the Association had the full title and that Vosper had no interest whatever.

If the plaintiff means by this part of the asignment of error that the decree of the Federal court should have been construed as holding that Vosper's right under the covenant of warranty to have any title that Donahue *might subsequently acquire inure to his benefit* was transferred by the decree to the Keweenaw Association Limited, it is sufficient to say that no such question was before the Federal court for adjudication, and such a decision could not possibly have been made under the pleadings in that case, and that there is absolutely nothing in the decree which could possibly be construed as so deciding

4. The decision of the court in this case was based upon general rules of law as administered by the courts of Michigan, as well as all other courts, that is, that under the facts of the case Michael Donahue, and the plaintiff in this case, who is his grantee, were estopped by the covenants of warranty *in the deed.*

The decree, as I have shown, held that the title was in the Association and that neither Vosper nor Donahue had any title or interest in the land, and that Donahue when he executed the warranty deed to Vosper had no title or interest in the land. The decision of the court was the conclusion drawn from that state of facts by the general law of the land, and did not depend upon any provision of the Constitution or Laws of the United States, or on any authority exercised under the United States. There was, therefore, no decision of the court against any claim asserted by the plaintiff under the Federal constitution, laws, or authority.

5. It is claimed by the plaintiff in the petition for a writ of error, that a right was asserted by him under the act of Congress of July 3, 1866. This was an act granting land to the state of Michigan, for the construction of a canal in the Upper Peninsula of Michigan, (13 U. S. Statutes at Large, 519-520,) under which the title to the lands finally became vested in the Lake Superior Ship Canal, Railway and Iron Company, and subsequently in the Keweenaw Association Limited. The plaintiff, in his bill, claims title through the Lake Superior Ship Canal, Railway and Iron Company and the Keweenaw Association Limited and, of course, through the granting act referred to. The validity of that act was not drawn in question. The decision recognized the validity of the grant, under which both parties claimed title. The question in this case, whether Donahue or Vosper had the title to the land interest in question, did not depend at all upon any construction placed upon the granting act, but on subsequent transactions. The claim of both parties, however, that the title passed from the United States by virtue of that act, which was the claim of both parties, was recognized and sustained by the court.

6. If it could possibly be said that a Federal question has been raised by the plaintiff, which was decided adversely to him, such question was too frivolous and absolutely without foundation to warrant this court in considering it. The proposition that the decree of the Federal court which adjudged that the title was in the Keweenaw Association Limited and that Vosper had no right, title or interest therein, should be construed as holding that Vosper did have an interest in the land and that that interest was transferred by the decree to the Keweenaw Association Limited, is not only too frivolous but too absolutely absurd to merit a moment's consideration; and if, on account of such proposition being raised,

the writ of error cannot be dismissed, the judgment of the Supreme Court of Michigan should be affirmed, on the ground that it is manifest that the writ of error was taken for delay only, and that the questions raised are too frivolous and too abusrd to be considered by the court.

DAN H. BALL,
Attorney of record for Defendants in Error.

State of Michigan, }
County of Marquette. } SS.

FRANK H. BERTAL, of the city of Marquette, in said county, being duly sworn, deposes and says that he is a clerk in the office of Dan H. Ball, Esquire, attorney for the defendants in error named in the foregoing motion and brief.

That on the 17th day of October, A. D. 1916, he deposited in the post office at Marquette, Michigan, in a sealed envelope, a true copy of the foregoing printed motions, and of the foregoing statement of pleadings and facts, and points and authorities, and of the argument thereon, as above set forth, together with the notice appended to said motions, of which the foregoing notice is a copy, plainly addressed to A. H. Ryall, Esq., Escanaba, Michigan, the attorney for the plaintiff in error, said Escanaba being the place of residence and place of business of said attorney, and that by the usual course of mail the same would be delivered at said place on the 18th day of October, 1916.

Deponent further says that the full legal postage was prepaid thereon.

FRANK H. BERTAL.

Subscribed and sworn to before me }
this 17th day of October, A. D. 1916. }

HARVEY B. HATCH,

Notary Public in and for said county
of Marquette and state of Michigan.
My commission expires June 13, 1918.

IN THE SUPREME COURT Of THE UNITED STATES

Martin Donohue,
Plaintiff in Error,
vs.
Benjamin Vosper, Fred H. Abbot, Maurice J. Tonkin and the Buffalo Iron Mining Company,
Defendants in Error.

October Term 1910
No. 445
In Error to the Supreme Court of Michigan

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANTS TO DISMISS WRIT OF ERROR OR AFFIRM DECREE

(References are to the Pages of the Transcript of Record Printed in this Court.)

Statement of Plaintiff's Claim

The controlling facts in this case are comparatively simple. In 1890 (R45) the United States started a suit in equity in the Federal Court for the Western District of Michigan to quiet its title to the land in question. One of the defendants in that suit was the Lake Superior Ship Canal, Railway and Iron Company, which in turn was succeeded in title by the Keweenaw Association, Ltd., and later by the Keweenaw Land Association, Ltd. During the progress of this suit the Keweenaw Association filed a cross bill not only against the United States, but also brought in numerous individuals as defendants, including Michael Donohue, the brother of the plaintiff in error in this case, and also Benjamin Vosper,one of the defendants

in error, and thru whom the other defendants claim title. This cross bill alleged that both Michael Donohue and Benjamin Vosper claimed certain interests in these premises. Vosper's claim to the land arose thru a deed purporting to have been executed by Michael Donohue dated December 29th, 1894, conveying an undivided quarter interest in the property.

So it appears that in the suit in the Federal Court the United States claimed title to this land as against the Keweenaw Association, and its grantors, while the Keweenaw Association thru its cross bill claimed title both as against the United States and Michael Donohue and Benjamin Vosper, who in turn claimed their title thru the United States.

On November 16th, 1896, a decree was entered by the Federal Court in this equity suit, (R22) which amongst other things provided:

> "This decree shall stand and operate as a release and conveyance from the United States, and each and every of the other of said defendants, (which included Vosper and Michael Donohue), and of all their right and title to said lands, and may be recorded in the records of the proper county. (R23)

By this decree the title to the land was vested absolutely in the Keweenaw Association, the complainant in the cross bill in the Federal Court. After the decree was entered, and Vosper having been decreed to have no title in this land, the Keweenaw Association being as determined by this decree, the sole owner of this land as against both Michael Donohue and Vosper, conveyed these premises to Michael Donohue by a deed dated November 30th, 1896, (R51 and 52) and on December 3rd, 1896, Michael Donohue conveyed them to Martin E .Donohue, the plaintiff in error. (R48)

As stated, prior to the decree of November 16th, 1896, Michael Donohue had given Vosper a warranty deed of an undivided quarter interest in this property, but when the decree was rendered no rights of Vosper in the land

or under the deed to him were preserved. The decree appears to have been entered by consent of Vosper, and at least on its face it purports to cut off all his right, title and interest in the premises.

It is the claim of the plaintiff in error that this decree of the Federal Court did absolutely cut off and foreclose Vosper from all of his rights in the property, and from all his rights under the warranty deed which he had obtained from his co-defendant, Michael Donohue prior to the rendition of the decree, because those were the rights which he was asserting against the Keweenaw Association, that the plaintiff in error has an absolute title to this property thru the deed from the Keweenaw Association in whose favor the decree of the Federal Court was rendered, that plaintiff in error acquired such title free and clear from all interest of the defendant Vosper or his grantees in the premises, no matter how that interest may have arisen, and that any benefit to which Vosper may have been entitled by virtue of the covenants of warranty in the deed to him from Michael Donohue cannot survive the decree of November 17th, 1896, at least not to the extent of subsequently vesting an interest to the premises in Vosper.

Discussion of Defendants' Motion

The defendants' motion is based on two grounds:

1st. That no federal question is involved in the Writ of Error; and

2nd. Because it is manifest that the Writ of Error was taken for delay only, and that the questions raised are so frivolous as to require no argument.

The defendants refer to a number of authorities on pages 13 and 14 of their printed motion. It can be conceded that the cases support the points urged by the defendants, but they have no bearing on this motion.

It is claimed that the Federal question in this case first appears in the petition for a Writ of Error and the accompanying assignments of error. There is nothing in the record to support this statement. The bill of com-

plaint (R 2-5) makes special reference to these proceedings in the Federal Court. The answer and cross bill of the defendants also makes special reference to them. (R13-15) In fact the cross bill of the defendants alleges: (R15)

> "These defendants admit that by virtue of the decree hereinbefore mentioned, dated November 17th, 1896, the title of said Keweenaw Association, Ltd., to said lands, was confirmed and quieted, and that it was thereby adjudged that the said Keweenaw Association was the owner in fee simple of said lands."

Again on pages 18 and 19 of the record, appears the recital of the defendants in their cross bill with reference to these proceedings, and they made this decree of November 17th, 1896, an exhibit, attached to their answer in the nature of a cross bill. (R21)

On the trial of the case, all the proceedings in this suit in the Federal Court were introduced in evidence, and appears as exhibits. (R45-47)

In the opinion of the trial court (R25-26) the Circuit Judge makes special reference to this decree of November 17th, 1896, and quotes the language which has been hereinbefore set forth. On page 27 the Circuit Judge states:

> "The Complainant claims * * * *
>
> Third. That the rights of Vosper, if he had any under the deed from Donohue, became vested in the Keweenaw Association by the decree of the Federal Court, of November 19th, 1896."

In disposing of this contention, the Circuit Judge said (R27-28) referring to this decree:

> "The parties not only acknowledge, but the decree settles clearly and absolutely that neither Donohue nor Vosper then had or ever had any right or title to the land in whole or in part and the provision for a release and a conveyance of that which it was known and adjudicated neither Donohue or Vosper had, was mere surplusage, and ineffective for any purpose."

It is this very conclusion of the trial Court with

which we differ, and claims that by so construing this Decree of the Federal Court, the State Court has failed to give it the force and effect which should be given, and has attempted to read into the decree a meaning which it does not contain, and to strike out of it a very essential part. Whether this contention be right or wrong, it certainly is entirely unfair for counsel in presenting this motion, to state to this Court that rights have not been claimed by this plaintiff in error under the decree of the Federal Court, because they have been from the very beginning of this litigation. Nor can it be said that the record does not affirmatively show that the alleged rights of the plaintiff in error under this decree of November 17th, 1896, have not been presented to the lower Court, and passed upon by that Court, and his rights determined adversely to his contention, and that he has been denied rights which he claims under this decree.

When the case was taken to the Supreme Court of the State of Michigan, these same questions were again presented. An examination of the briefs filed in the State Supreme Court will show that a large portion of the briefs of both parties was devoted to an argument of this question.

The State Supreme Court states in its opinion: (R78)

> "The complainant makes the following contentions: * * * * *
>
> 2nd. That the decree of 1896 entirely cut off any right Vosper could have had in the land under the Warranty Deed of 1894."

And on R 79, the State Supreme Court says:

> "The next contention of complainant involves the effect of the decree of the Federal Court."

It thus appears clearly from the record that this claim of the complainant under this Federal decree was again asserted in the State Supreme Court, and again passed upon by that Court in a manner adverse to the claim of the plaintiff in error. So we repeat that there

is not the slightest foundation for the assertion that the rights of the plaintiff in error under this decree of November 17th, 1896, have not been presented to the State Courts by the pleadings, and by the testimony from the very beginning of this suit, and that the question of his rights under this decree have been considered, and that the decree has been construed by both of the State Courts, ~~and that if the plaintiff in error is right in his contention, Courts~~ contrary to the contention of the plaintiff in error, and that if the plaintiff in error is right in his contention, or if he has any rights under this decree of November 17th, 1896, those rights have been denied him by the State Courts.

It would hardly seem necessary to say more in reply to the first point raised by the defendants in their motion, and that it would simply be wasting time of this Court to call further attention to what appears in the record to show that a Federal question is involved in this case.

THE LAW.

The law on the subject is very clear. Section 709 of the United States R. S. provides that a final decree in any suit in the highest court of a State in which a decision in the suit could be had where there is drawn in question an authority exercised under the United States, and the decision is against its validity, or where any title or right is claimed under any authority, exercised under the United States and the decision is against that right or title, especially set up or claimed by either of the parties, then such final decree may be re-examined by the Supreme Court upon a Writ of Error.

Where the State Court refuses to give effect to the judgment or decree of a Court of the United States rendered upon a point in dispute, it denies the validity of an authority exercised under the United States.

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 311.

A decision of a State Court denying the parties contention that a judgment of the Circuit Court of the United

States shall be given effect, presents a Federal question.

Hancock Nat'l Bk. vs. Farnum, 176 U. S. 640.

Dupasseur v. Roehereau, 21 Wall. 130.

Whenever a state court refuses to give effect to a judgment of the Court of the United States rendered upon the point of dispute, and with jurisdiction of the case and of the parties, the Supreme Court has jurisdiction to review the decision as involving a denial of a title or right claimed under an authority exercised under the United States.

Dupasseur v. Rochereau, (1874) 21 Wall. (U. S.) 130;

Pittsburgh, etc. R. Co. v. Long Island L. & T. Co. (1899) 172 U. S. 493;

Central Nat. Bk. v. Stevens, (1898) 171 U. S. 109;

Crescent City Live Stock Co. v. Butchers' Union Slaughter House Co. (1887) 120 U. S. 141.

These decisions all fully support the proposition that where a person claims title to land under a decree of a Federal Court, and it is necessary in the determination of that title to construe the decree, and the construction placed upon that decree by the State Court is adverse to that claimed by either party, the party so aggrieved may have the question reviewed and have the decree construed by the Supreme Court.

In Central National Bank vs. Stevens, (Supra), it is said:

> "Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of this court, on a writ of error to the supreme court of the state. Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U. S. 141, 7 Sup. Ct. 472."

In Pittsburgh, etc., vs. Long Island Loan & Trust Co., (Supra), the question arose as to the effect of a decree in a mortgage foreclosure suit brought in a Federal Court,

and this court reviewed a number of cases where decrees of Federal Courts had been brought into question in other proceedings, and after so doing, said:

> "According to these decisions, and in view of the statute giving this court authority to re-examine the final judgment of the highest court of a state denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the circuit courts of the United States under which the plaintiff in error claims title to the lands and property in question."

The second ground on which this motion is based is that the question raised is too frivolous for the consideration of this Court. The property here involved is very valuable. It involves a quarter interest in a large operating iron mine. Its importance to the plaintiff in error removes it entirely from the sphere of frivolity so far as he is concerned.

The legal question involved has been seriously discussed by a great many Courts, and it is believed that the conclusions reached by at least some of these Courts is entirely contrary to those adopted by the Michigan Courts in this case, and that this Court would be willing to listen to these contentions before concluding that they are without any merit.

It is quite possible that this decree is much broader than was intended by the parties, but that question is not open to discussion now. There is just one point with reference to it however, which we think deserves attention. Mr. Ball as counsel for the Keweenaw Association in the suit in the Federal Court and in favor of whose client this decree passed, doubtless considered that the matter was of sufficient inportance to use the language which the State Court has now characterized as surplusage. He also doubtless thought that Michael Donohue and Mr. Vosper, the latter being his present client, had a claim to this property, which was sufficiently serious to justify him in making them a party to the cross bill in

the Federal Court. Mr. Vosper was and still is an attorney of good standing, and this decree of November 17th, 1896, was rendered with his consent, so that if it went further than was intended, the plaintiff in error is not to blame.

It also appears from the record that the plaintiff in error purchased from his brother for a valuable consideration, and in good faith in fact and relying upon the deed of November 30th, 1896, from the Keweenaw Association to his brother Michael, and without any knowledge on his part of the Warranty Deed from Michael to Vosper.

There is however, nothing to prevent counsel for the defendants from asserting that this contention now presented to this Court is made for delay only, or that the question raised is too frivolous or too absurd to be considered by this Court, but we believe that there is very respectable authority to support the contention urged by the plaintiff in error, and that he should be given an opportunity to be heard thereon before this court dismisses the Writ of Error in a summary manner.

Both of the State Courts considered the question of the effect of this decree. In neither opinion is there the slightest intimation that they considered the question frivolous or absurd. The Circuit Court met or rather evaded the question by saying that the provision for a release and conveyance was mere surplusage, and ineffective for any purpose. That of course was the same as saying that the decree did not mean what it said, and that certain portions of it could be entirely ignored.

The State Supreme Court devoted a considerable portion of their opinion to the discussions of this question, and they disposed of this decree by saying: (R79)

> "We do not think that it can be contended that Vosper was adjudged to have no title as the result of the release clause in the decree, since there was in fact nothing to be released if he had no interests."

It is apparent that this was also an effort to avoid the effect of this decree by holding that it did not mean

what it said, and that the language of the decree was mere verbage, although it bears all the earmarks of having been carefully prepared by Mr. Ball as attorney for the then complainant.

It is therefore respectfully submitted that this motion should be denied, and that plaintiff in error should be given a hearing on this important question, because if State courts can avoid the effect of the decrees of the Federal courts by asserting that language used therein is surplusage, or does not mean what it says, then these decrees have but little value, and rights based thereon are without protection.

Respectfully submitted,

A. H. RYALL,

Attorney for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES

Martin Donohue,
Plaintiff in Error,
vs.
Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and Buffalo Iron Mining Company, a corporation,
Defendants in Error.

October Term, 1916
No. 445.

STATEMENT OF THE CASE

(References are to printed Record in this Court)

This Bill was filed by the complainant to quiet his title to an undivided one-fourth interest in land which was claimed by defendants to have been conveyed by a deed from complainant's brother and grantor Michael Donohue, to the defendant, Benjamin Vosper, on December 29th, 1894. The defendants, Abbott and Tonkin claim thru Vosper, and admittedly are charged with any defect in the title which has been urged by the complainant in this case.

The defendant, Buffalo Iron Mining Company is eliminated by virtue of a stipulation on file in this cause, whereby the complainant consents that in event of his being successful in asserting his claim, he will allow the mining lease held by that company to remain in force as to the interest in litigation.

It is admitted that complainant's brother and grantor, Michael Donohue, entered these lands in 1883, claim-

ing them as a preemptor. The alleged deed from Michael Donohue to Vosper, is dated December 29th, 1894, and is a warranty deed in form. (R39). The validity of this deed is one of the questions in dispute, its execution being denied by the complainant, and his grantor.

It is also admitted that on December 18th, 1890, the United States filed a bill (R45) in the United States Circuit Court for the Western District of Michigan, to quiet the title of the United States to about 15,000 acres of land, including that involved in this suit, and that Michael Donohue, and the defendant Vosper were made parties defendant to that suit. Afterwards, by a stipulation signed by Michael Donohue and other defendants (Ex. 2, R 66), a decree was entered in this case, (Ex. "A", R 21), in the United States Court for the Western District of Michigan, on November 17th, 1896, by which it was decreed that the title of the Keweenaw Association, Limited, which also claimed this land by virtue of a cross bill in this case (R 21)—

> "be and the same is hereby forever quieted in said * * * Association * * * as against said United States of America, and each and every of said defendants in said cross bill hereto consenting as herein named," including Michael Donohue and Benjamin Vosper.

This decree of November 17th, 1896, also provided:

> "this decree shall stand and operate as a release and conveyance from the United States, and each and every of said defendants of all right and title to said land, and may be recorded as such in the records of the proper county."

By a deed dated October 31st, 1896, (Ex. T. R. 51) but acknowledged November 19th, 1896, and recorded November 29th, 1896, the Keweenaw Association, Limited, conveyed the lands in question to Michael Donohue. It is admitted that this deed, although dated prior to the Decree, was not delivered until after the Decree. (R 67). It appears from the deed, (R52) that both Mr. Vosper and Mr. Ball, were the witnesses to this deed, and that

it was executed in Kent county, and Mr. Vosper testified (R 67) that:

> "A day or two after the decree of November 17th, 1896) a deed was given to Michael Donohue for this land in pursuance of the settlement."

It is the claim of the complainant that this decree of November 17th, 1896, entirely cut off the interest of the defendant Vosper, in these lands, including any right which he may have had under the warranty clause in the alleged deed of December 29th, 1894, and that after the decree had been entered, Vosper's interest in this property, and all conveyances relating thereto, absolutely ceased.

Complainant also claims to be a purchaser in good faith, without notice of Vosper's claim to the land, and that for various reasons the record was not constructive notice of Vosper's claim. It also appears that complainant's grantor, and afterwards complainant, have been in possession continuously of this land since 1883, claiming it as their own, and it is complainant's contention prior to the decision of this Court in Canal Co. vs. Donohue, et al. Dec. 10, 1894, 155 U. S. 355 and 386, and after the forfeiture Act of 1889, the United States of America filed its bill against the Canal Company and its successors, for the purpose of quieting the title of the Governor to these lands. The Canal Company and the Keweenaw Association, filed a cross bill praying for a Decree quieting its title to the lands. Afterwards, a supplemental cross bill was also filed by the Canal Company, and its successor, praying for a decree declaring the Keweenaw Association to be the absolute owner as against the defendants Vosper and Donohue. On these pleadings, the decree of November 17th, 1896, was entered by the United States Court at Grand Rapids.

STATEMENT OF CASE OF PLAINTIFF IN ERROR.

1st. That the rights of Vosper, if he had any under the deed from Donohue were entirely cut off by the Decree of the Federal Court of November 17th, 1896.

2nd. That Martin Donohue was a bona fide pur-

chaser in good faith and without notice of Vosper's claim to the land, and that the deed of Vosper was so defectively recorded as not to be constructive notice to Michael Donohue.

3rd. That complainant, even if the deed to Vosper was valid and properly recorded, was not charged with constructive notice of said deed because Michael Donohue had no title to the land when he gave the deed, but subsequently acquired a title and thereafter deeded to complainant.

4th. That the complainant had acquired the title by the adverse possession of himself, and of his grantor, Michael Donohue.

I

The Rights of Vosper If He Had Any Under The Deed From Donohue Were Entirely Cut Off By The Decree Of The Federal Court Dated November 17th, 1896.

The Court will remember that the case in which this decree was entered was originally a bill filed by the United States to quiet its title to this land, and was brought originally against the Canal Company. A cross bill was filed in which both Benjamin Vosper and Michael Donohue were made parties Defendant, and finally a decree was entered in favor of the Canal Company and its successor in title, the Keweenaw Association, Limited, by which it was determined that the title of the Keweenaw Association

"be and the same is hereby forever quieted***in said Association, as against said United States of America, and each and every of said defendants in said cross bill hereto consenting as herein named" including Michael Donohue and Benjamin Vosper.

The Decree further provided:

> "This Decree shall stand and operate as a release from the United States and each and every of said defendants of all right and title to said land, and may be recorded as such in the records of the proper county."

This Decree was entered by the consent of the Defendant Vosper in open Court and was fully supported by the pleadings in the case.

It is the claim of the complainant that this decree means exactly what it says, and that it is final and binding upon all the parties. The decree cannot be contradicted and it absolutely cuts off all the rights of both Donohue and Vosper.

We understand that it is well established and admitted by the defendants in this case that the averments and disclosures of the record of a decree cannot be controverted, but if there is any question on this point, we call the Court's attention to the following authorities:

Black on Judgments, Sec. 614-25-26.

Cromwell vs. County of Sack, 94 U. S. 351.

Last Chance Mining Co. vs. Tyler, 157 U. S. 683.

In one of the briefs filed by defendants in the Circuit Court, the defendants say with reference to this decree:

> "Whatever might have been the result of a contest, or whatever the decree might have been if it had been brought out, that decree entered by his (Michael Donohue's) consent, concluded him, and as between these parties it was settled and determined that neither Donohue nor the United States, nor Vosper had any right, title or interest in or claim to the land. That decree settled the fact conclusively between these parties. . (Brief of D. H. Ball).

We therefore take it as granted that the binding effect of this decree is admitted, and that the only question at issue is its proper construction and effect.

It is claimed of the complainants that the decree operated as a conveyance from Michael Donohue and Benjamin Vosper to the Keweenaw Association. That by virtue of its effect as a conveyance, it releases the interest which Vosper had in these lands by virtue of his warranty deed, and left him no interest whatsoever therein, and that this decree should be treated exactly the same

as though Vosper had executed a quit-claim deed to the Keweenaw Association.

Complainant's contention relative to the effect of this decree, supported as we believe by the authorities hereafter cited, can be stated in the following propositions:

(a) The alleged deed of December 29th, 1894, contained the usual convenants of warranty and the grantee Vosper obtained by estoppel any title subsequently acquired by the grantor Donohue, so long as Vosper had not parted with this right by conveyance or otherwise.

(b) This benefit from the covenant is a right, title or interest in the land, because it operates in favor of the grantees of the original grantee. It can be conveyed the same as any other interest in the land and passes with any attempted conveyance by the original grantee.

(c) But both Vosper and his grantor Donohue were made parties defendant to this suit to quiet title and they were both decreed to have no right, title or interest in this land and the decree was made to operate as a conveyance from them to the Keweenaw Association. This decree is absolutely binding on the parties and cannot be contradicted.

(d) The decree has that effect even though without foundation in fact and even though it unintentionally cut off Vosper's rights. It is practically admitted that it was contrary to the facts so far as Donohue was concerned in view of the decision in Donohue vs. Ship Canal Company, 155 United States, 386. Vosper was an attorney and should have seen to the protection of his own interests by a clause to that effect in the decree.

(e) A decree quieting title and operating as a conveyance as this decree did, is equivalent to a deed from the person ordered to convey to the person in whose favor the decree is rendered. The Courts treat such a decree exactly the same as though the deed had been executed. Suppose Vosper had executed a quit-claim deed

to the Keweenaw Association, would he have any standing in this case?

(f) These covenants run with the land. When the covenantee voluntarily by deed or involuntarily by decree conveys the land covered by the deed which contains the covenant, he thereby loses the benefit of the estoppel and it vests in his grantee. Therefore, all of Vosper's rights under these covenants passed from him to the Keweenaw Association.

(g) The effect of this decree is entirely different from any other action whereby it is simply determined that the covenants were broken and wherein no affirmation action is taken with reference to the interests of the covenantee in the land.

(h) This decree having completely and entirely cut off all the right, title and interest of both Vosper and Donohue, and having vested his title in the Keweenaw Association, Donohue was at liberty to again acquire title, free and clear from any claim on the part of Vosper and to transmit it unincumbered to his brother Martin.

(a) The alleged deed of December 29th, 1894, contained the usual covenants of warranty and the grantee Vosper obtained by estoppel any title subsequently acquired by the grantor Donohue, so long as he had not parted with this right by conveyance or otherwise.

This proposition is elementary and hardly needs reference to authority but we desire to cite the cases of,

Shotwell vs. Harrison, 22 Mich. 410-411.

Park Association vs. Ry. 172 Mich. 179-187.

(b) This benefit from the covenant is a right, title or interest in the land, because it operates in favor of the grantees of the original grantee. It can be conveyed the same as any other interest in the land and passes with any attempted conveyance by the original grantee.

While this proposition is universally admitted, we believe that there is much misapprehension or, at least, lack of clear understanding as to the exact nature of

this right which arises from the covenants of warranty. The question has not been touched upon by many of the reported cases but we believe that such cases as have passed on the question, sustain the proposition as here stated.

While the exact question has not been passed upon in Michigan, the existence of the rule is recognized in,

Pendell vs. Agricultural Society, 95 Mich. 491.

And the general rule is laid down in
16 CYC, 717, as follows:

"An estoppel arising against a grantor may be urged by persons claiming under the grantee. The right of a grantee to assert an estoppel as to after-acquired property inures to those claiming under him by deed. This is allowed, however, not because of privity between the grantee and the sub-grantee, but because the covenant of warranty in the original deed runs with the land."

In Douglas vs. Scott, 5 Ohio, 195, the Court says:

"That the estoppel extends to all persons subsequently acquiring title has at all times been the doctrine of the books. In Trevinan vs. Lawrence, the Court says: 'Where the estoppel works on the interest in the land, it runs with the land into whose hands it may come;' and Justice Story in the case in 4 Peters, 85, reviewing the authorities, says: 'Such estoppel binds all persons claiming the land, not only in the same deed, but under any subsequent conveyance from the same party, **that such an admission** in a recital, by the same person transmitting the title, **is a muniment of title**, and travels with the land into whomsoever's hands it may come."

And in Johonson vs. Johnson, 170 Mo. 34; 59 L. R. A. 748-752, where this exact question was presented, it is said:

"The real controversy in this case is whether or not the after-acquired title of George W. Johnson inured to the benefit of the successor in interest of his grantee in the warranty deed of February 27, 1877. * * *"

"Upon every consideration of reason and common sense it ought to be held that when a grantee,

enjoying the benefit of a prior covenant, undertakes to convey all his interest in a tract of ground, with all the rights and privileges appurtenant thereto, his grantee will succeed to the enjoyment of the covenant, and especially is that true when the covenant by its very terms, runs to him and his assigns, as is the case here. Immediately upon Jackson's quit-claim conveyance to defendant, the benefit of the covenant made to Jackson passed to his grantee, until he, in turn, conveys. In other words, the covenant runs with the land."

Our purpose in urging this point is to keep clearly before the Court the effect of this decree which operated as a conveyance from Vosper to the Keweenaw Association, and which divested Vosper of all his rights in this land, and of all interest in these covenants. His rights thereby merged with Donohue's in the Association.

(c) But both Vosper and his grantor Donohue were made parties defendant to this suit to quiet title and they were both decreed to have no right, title or interest in this land and the decree was made to operate as a conveyance from them to the Keweenaw Association. This decree is absolutely binding on the parties and cannot be contradicted.

We wish to again direct the Court's attention to the exact wording of this Decree, which reads:

"And it is further ordered, adjudged and decreed that the title of said Keweenaw Association, Limited, in and to each and every of the parcels of the land hereinafter described, be, and the same is hereby, forever quieted in the said Keweenaw Association (Limited), as against the said United States of America and each and every of the said Defendants in the said cross bill hereto consenting and herein named. * * *

"This decree shall stand and operate as a release and conveyance from the United States, and each and every of the other said Defendants, of all right and title to said lands, and may be recorded as such in the records of the proper county.'

We contend that this language means exactly what

it says and must be construed according to its language as there stated.

We do not understand that the Defendants dispute the binding effect of this Decree, but that the question may be finally put at rest, we desire to call the Court's attention to the cases of,

Going vs. Agricultural Society, 117 Mich. 230.
Waldo vs. Waldo, 52 Mich. 91.

Southern Pacific vs. U. S. 168 U. S. 1; 18 Sup. Ct. Rep. 18.

Gray vs. Gillan, 15 Ill. 454.

Numerous other cases might be cited but the whole doctrine has been so fully stated by Justice Harlan in Southern Pacific vs. U. S. supra, that we cannot do better than quote from his opinion:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. * * *"

> "In Hopkins vs. Lee, which was a suit in equity by the purchaser of land to compel the vendor to remove certain incumbrances upon it, it was held that a fact established therein, and made the basis of a decree, could not be disputed in a subsequent action of covenant brought by the latter against the former for not conveying certain lands, part of the consideration, the Court saying that the rule on that subject had found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could not be put to litigation; in Smith vs. Kernochen, which was ejectment by an assignee of a mortgage to recover possession of the mortgaged premises, that a final decree in a previous suit, brought by the mortgagee against the mortgagor to foreclose the mortgage, adjudging the mortgage to be invalid for want

> of authority in the mortgagor to execute it, concluded the question of title, the Court observing that the case came within the general rule that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive between the same parties or their privies, upon the same matters, when brought directly in question in another court; in Thompson vs. Roberts, that the judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit."

Since Vosper's rights under this covenant was an interest in land and ran with the land, (b, supra) and since the decree "Shall stand and operate as a release and conveyance from * * * each * * * defendant * * * of all right and title to said lands," how can Vosper still claim to have any rights under this covenant of warranty?

(d) The decree has that effect even though without foundation in fact and even though it unintentionally cut off Vosper's rights.

It is claimed that the decree was not intended to have the effect of cutting off Vosper's interest in this land. We submit that question is not open in this case. Any such attempt to change the plain wording of this decree would be a flagrant case of varying its plain language by parol testimony, and we submit that cannot be done without violation of well recognized rules of evidence.

Wigmore on Evidence, Sec. 2425 states the rule to be,

> "When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purposes of determining what are the terms of their act."

At Section 2450, Wigmore says:

> "The theory of judicial records is that the judgment roll, as finally made up, embodies in itself alone the entirety of the controversy as adjudicated,

and thus supersedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings. The history of this theory has already been examined. Its principle is today well established in the law.

Ellenborough, C. J., in Remsbottom vs. Buckhurst, 2 M. & S. 565, 567, said: "The judgment roll imports incontrovertible verity as to all proceedings which it sets forth; and so much that a party cannot be admitted to plead that the things which it professes to state are not true. * * *Every part of the record, so long as it remains on the files of the Court, must be taken to speak absolute verity."

This question has been passed upon by the Supreme Court of Michigan in,

Going vs. Agricultural Society, 117 Mich. 230.

In that case, the defendant had no authority to sell its land without an order of the Court, but did in fact attempt to do so, and plaintiff purchased one of the lots on contract. Before plaintiff demanded the return of his money as to some of the lots, the defendant filed a bill in equity, making plaintiff and other defendants, for the purpose of quieting its title, and praying for a decree that it had a right to sell the lands. Plaintiff did not appear and the bill was taken as confessed as to him, and a decree was entered, declaring title to be quieted in the defendant, and that it had a right to sell the lands. Plaintiff afterwards sued to recover the purchase price paid on account of the contract and for improvements on the land. The defendant claimed that the decree in equity was res adjudicata, and settled the question. The Court said:

"The plaintiff was made a party of that suit. The prayer of the bill has been heretofore set out, and it is unnecessary to repeat it; but it shows just what relief the defendant corporation was asking, and the decree grants the relief prayed for. The plaintiff himself has made no motion to disturb that decree. It must be treated as res adjudicata as to him, and conclusive upon all the parties and their privies. Kent County Agricultural Society, vs.

Houseman, 81 Mich. 609. Therefore, so far as the parties to this action are concerned, the question was settled in that suit that the defendants had conveyed a good title by these contracts. The decree was made and entered March 17th, 1896, which was before the time plaintiff made his tender of the money of the contracts. That tender was made the fore part of June, 1896, and the deeds under the contracts tendered to plaintiff on the 23rd of that month.

Some question was raised on the trial that the decree entered in the chancery cause was not the decree which the Court intended to make. But that decree is set out in the record, and, so far as appears by this record, stands undeversed and undisturbed, and is binding upon the parties."

In Bruce vs. Osgood, (Ind.) 56 N. E. 25, the judgment was attacked because of some fraud in procuring it, but it was held that the defense should have been urged in the Court where the judgment was taken, the Supreme Court saying:

"Its (the lower Court) judgment, if conceded to be wrong is impervious to attack."

A decree quieting title and operating as a conveyance as this decree did, is equivalent to a deed from the person ordered to convey to the person in whose favor the decree is rendered. The Courts treat such a decree exactly the same as though the deed had been executed. Suppose Vosper had executed a quit-claim deed to the Keweenaw Association, would he have an standing in this case?

We think this phase of the case has been entirely overlooked. In order that there may be no misapprehension about the effect of this decree, it may be well to consider just the nature of these proceedings in the U. S. Court. It was a bill to quiet title brought by the United States against the Keweenaw Association and in which the Association filed a cross bill making Donohue and Vosper defendants. The decree as finally entered was based on the cross bill. All the parties were before the Court, and all their rights and interests could have been

protected by the decree. But Vosper who was an attorney permitted this particular form of decree to be entered, and he should abide by it.

Such decrees as this have been held to amount to deeds from the persons against whom the decrees run.

A case much in point is,

Devin vs. City of Ottumwa, 5 N. W. (Ia.) 552.

In that case the land was patented to certain County Commissioners who thru mesne conveyances deeded Devin. Afterwards Devin and City of Ottumwa were made co-defendants in a suit wherein certain plaintiffs claimed to be equitable owners of the land, and they each filed answers. In that suit a decree was entered quieting the title of Devin as against the Complainants. The language of this decree was narrower than in the case at bar, and read:

> "It is therefore ordered and declared that the title to the lands hereinbefore described be quieted and confirmed in the defendant and grantees, as against the plaintiffs, or persons claiming under or thru them, or any of them, and that plaintiffs be forever barred from having or claiming any interest in any of the premises as against said Thomas Devin or his grantees."

Afterwards the City of Ottumwa claimed this same land just as Vosper does in this case, and Devin brought an action to recover the land. Devin relied on the former Decree as an adjudication of his rights and in holding the former Decree binding the Court said:

> "It is claimed by counsel for appellant that these parties, being both defendants in the former action, did not seek to have the title as between themselves determined, but that they united to defeat a common enemy, and that, therefore, their rights as against each other were in no manner presented for adjudication, and were not determined. * * * It can make no difference that they were both defendants. They were parties each claiming to be owner of the land. It is true that neither in terms claimed affirmative relief as against the other; but as the petition asserted that the plaintiffs had

title to certain undivided interests, and the defendant Devin certain other undivided interests, and the City took issue with the plaintiffs and Devin, the decree quieting the title in Devin to the land in controversy necessarily determines that it was not a part of Front street.

"It was necessary for the City to maintain the allegations of its answer in that action to prove that the land was a part of Front street. It seems to us that the City, having made the issue and asserted its right, in the former action, must be held to be concluded by that decree. It is true the decree quiets the title in Devin as against the plaintiffs or persons claiming under or thru them, and does not in terms quiet his title as against the city. But the decree also finds that the county derived title to all the lands in controversy from the United States, and that the county conveyed in fee-simple to Biggs and that Biggs conveyed to Devin. It follows that it was necessarily decided in that case that Devin took an absolute title to the property, and that it was such property as the county might lawfully convey."

In Davis vs. Lennen, 24 N. E. (Ind.) 885,

Mrs. Lennan, who was formerly Mrs. Scott, the widow of Thomas Scott, deceased, had deeded the land in question to one Davis, who in turn had mortgaged the property and it had been bid in by the plaintiffs. It was held that this deed given by Mrs. Lennen was void, as was the subsequent foreclosure but the mortgagor, prior to foreclosure, had brought a bill to quiet title, but the case does not disclose just who had been made defendants.

In speaking of the effect of this decree quieting title, the Court said:

"If the appellant acquired title, it must be for the reason that the decree in the suit to quiet title divested the title of the appellee and the other defendants to that suit, and quieted it in Clarinda Davis. If the decree in that suit did quiet title in her, it freed the property from all claims of whatsoever nature of the Defendants existing at the time the suit was instituted, for it is settled law that a decree quieting title concludes the parties. This has long been established law."

"**A complaint to quiet title challenges the defendants to present their claims, and directly gives them an opportunity to assert their interest or title, and, if they fail to do so, they are concluded.** This doctrine is as old as this court; indeed, it is much older. Fischli vs. Fischli, 1 Blackf. 360. It has been approved and enforced time and time again, In the suit to quiet title Clarinda Davis asserted that she was the owner of the land in fee-simple, and it was this assertion of ownership that the defendants were challenged to contest. If she was, in fact, the sole owner in fee, the defendants could not possibly have any title whatever, for the existence of a fee-simple is always and absolutely exclusive."

* * *

The Decree declares that the widow of Thomas E. Scott took and held the land in fee-simple, and recites the conveyance to Clarinda Davis. This, of itself, in an adjudication that the grantor of Clarinda Davis was the owner in fee of the land, and concludes all who were defendants to that suit. But there is much more in the decree; for it is found and declared by the Court that all of the allegations of the complaint are true, and this is, of course, a finding that the statement of the complaint that the plaintiff was the owner in fee-simple is true. If she was the sole owner in fee, the controversy is at an end. There is a further decretal order, which, if possible, strengthens the appellant's title. That **order reads thus:** 'That the title of the said Clarinda Davis be forever quieted and set at rest as to all and each of said defendants, and **that they and each of them be forever divested of all right, title, interest and claim in and to said real estate, and every part thereof.' That this decree concludes the appellee, and all who were parties to the suit to quiet title is to our minds too clear for controversy.** It matters not how many or how great the errors of the Court in the course of the suit, the decree is not void, and, if not void, no collateral attack can be availing."

In Morarity vs. Calloway, 34 N. E. (Ind.) 226:

Moriarity had bought land from Mr. and Mrs. King while she was a minor. On attaining her majority, she repudiated her deed and brought a suit against Morarity to quiet title in which she was successful. While in

possession of the land, Morarity had paid taxes, and performed work which gave him a lien on the land. The Kings afterward conveyed to Calloway and Morarity brought an action to assert his liens. In holding the decree had cut off all his interest in the land, the Court said:

> "It is contended by the appellee that appellant is estopped by the decree quieting title from now asserting any interest on the land existing prior to the date of such decree; while the appellant contends that, as the primary object of that suit was to avoid the deed executed by Phoebe King while a minor, no such estoppel exists. We are of the opinion that the decree quieting title as against any claim to the land described in the complaint held by the appellant at the time such decree was rendered estops him from now asserting such claim. * * * To permit the appellant to assert these supposed liens now would be to hold that the title of the appellees to the land described in the complaint was not quieted, notwithstanding a general decree of a court of competent jurisdiction to the effect that such title is quieted as against all claims of the appellant."

In Kelly vs. Donlin, 70 Ill. 378-386:

the question of the effect of a decree quieting title was an issue. A decree had been entered quieting title in Complainant's grantors, and the effect of this decree on Defendant's title was questioned. The Court held that such a decree was substantially the same as a deed, saying:

> "A judgment which affects directly the estate and interest in the land, and binds the rights of the parties, is at least as effectual as a release or confirmation by one party to the other. Such an estoppel makes part of the title, and extends to all who claim under either of the parties to it."

In 23 CYC 1336, it is said:

> "Action to quiet title. In this form of action **all matters affecting the title** of the parties to the action **may be litigated and determined,** and the judgment is final and conclusive, and cuts off all claims or defense of the losing party, going to show

title in himself, from whatever source derived, and which existed at the time of the suit, whether pleaded therein or not."

We therefore, respectfully submit that this decree was quite as effective as though Vosper and Donohue had actually executed and delivered a deed to the Association, and cut off all the rights of each in the land.

(f) **These covenants run with the land. When the covenantee voluntarily, by deed or involuntarily by decree, conveys the land covered by the deed which contains the covenant, he thereby loses the benefit of the estoppel and it vests in his grantee. Therefore, all of Vosper's rights under these covenants passed from him to the Keweenaw Association.**

Since these covenants run with the land, it is difficult to see how Vosper retained any rights under them after this decree which cut off all his rights and interest therein.

It must be borne in mind that there is not the slightest evidence of any breech of the covenants of warranty in this deed prior to the date of this decree on November 17th, 1896. The deed is dated December 29, 1894. On December 10th, 1894, the Supreme Court of the United States had decided in substance in Donohue vs. Canal Company, that Donohue was the owner of an undivided half interest in the premises. The deed to Vosper covered only an undivided one-fourth interest so that up to the time this decree was entered, there was no evidence of any breach of covenant.

There was therefore no occasion to have recourse to these covenants prior to the decree and the very decree which it is now claimed is proof of a breach of the covenant, also decides that Vosper has no right or title in the land, and that the decree shall operate as a conveyance of the interests of Donohue and Vosper to the Keweenaw Association. A few days later the Keweenaw Association conveyed to Donohue. We submit that

thereby the covenants contained in this prior deed were extinguished.

In Brown vs. Metz, 33 Ill., 342,

A conveyed land with covenants of warranty to B, who executed a mortgage to C, and under foreclosure the lands were again acquired by A , who again conveyed to B, but by quit-claim deed. B then brought an action against A, on account of a mortgage executed prior to the first deed from A to B, claiming the benefit of the covenants in the first deed. The Court held that these covenants had been extinguished by B's conveyance thru foreclosure back to A, and said:

> "Coke, in his commentaries upon Littleton, says, (vide Sec. 743): 'When the warrantor takes back an estate as large as that which he had made, the warranty is defeated; because he cannot warrant land to himself, nor be an assignee of himself.' Littleton and his illustrious commentor give numerous instances of the extinction of covenants by a reconveyance of the state to the warrantor. 1 Shep. Touch. 201; Platt on Cov. 585.
>
> "The person seized of the estate conveyed, always had the power to release the covenantor, or warrantor, from his liability before the covenant or warranty was broken. As the covenant, or warranty, ran with the land until a breach, the reconveyance of the land before that time to the covenantor, or warrantor, transferred to him the covenant or warranty, without liabilty upon it to any one."

So when mutual covenants are contained in deeds back and forth between the same persons, they are cancelled even as against persons claiming thru either of them. Such was the case of,

Silverman vs. Loomis, 104 Ill. 137,
where the Court said:

> "Silverman, on his purchase from Runyan, having agreed to take up and surrender to Loomis the notes sued on, it is clear he was bound to do so unless he was relieved from the performance of that undertaking by reason of having been compelled to

redeem the premises from the sale under the Scribner mortgage, and whether he was so relieved or not, of course depends upon whether Loomis is liable to Silverman on the covenants in the former's deed to Runyan, and upon the decision of this question the case depends. The Circuit Court held, and we think properly, that the conveyance and reconveyance of the premises between Runyan and Loomis by operation of law cancelled or extinguished the covenants in the latter's deed as to all incumbrances covered by Runyan's deed to Loomis."

In Kellogg vs. Wood, 4 Paige, Sh. 578, 614, in a similar case the Court said:

> "In other words, if A conveys to B with warranty, and B then reconveys to A with warranty, the last covenant can only protect A against a title or incumbrance from or under B subsequent to the original conveyance to him. And if A is evicted in consequence of an incumbrance or defect in the title prior to that time, he cannot recover against B on the covenant contained in the last conveyance, as the covenant in the first would be a complete bar to the suit."

(g) **The effect of this decree is entirely different from any other action whereby it is simply determined that the covenants were broken and wherein no affirmative action is taken with reference to the interest of the covenantee in the land.**

This distinction has been made clear by the cases quoted from and further citations are unnecessary.

Defendants claim that this decree merely decided that Donohue had no title and that the covenants of warranty had been broken. The decree did that but it also did much more. It decided that **neither** Vosper nor Donohue had any interest in the land and it cut off all the claims of **both.** It also operated as a deed from **both.** Defendants' fallacy lies in failing to recognize the full force of this decree.

It therefore follows that:

This decree having completely and entirely cut off all the right, title and interest of both Vosper and Don-

hue, and having vested Vosper's title in the Keweenaw Association, Donohue was at liberty to again acquire title, free and clear from any claim on the part of Vosper and transmit it uncumbered to his brother, Martin.

II

Complainant has acquired title to the premises by the adverse possession of himself, and his grantor, Michael Donohue.

There is no doubt but what Michael and Complainant have been in the actual, exclusive and open possession of this property since 1883. The only question is whether this possession has been hostile and adverse to Vosper and his grantors.

The alleged deed from Michael and Vosper is dated December 29th, 1894. The deed from the Keweenaw Association to Michael Donohue was dated October 31st, 1896, and recorded November 30th of that year. It was delivered some time after the decree of November 17th, 1896 was entered. The deed from Michael to Complainant was dated and recorded December 3rd, 1896, and Complainant continued in posssesion as he had been before. This suit was started December 9th, 1913, almost exactly seventeen years after Complainant obtained his deed.

The alleged break in the title during that time was the execution of the agreement of December 16th, 1908, between Complainant, et al, and Niagara Iron Mining Company for an option. This, we claim, did not operate to stop the running of the Statute.

In Houlihan vs. Fogarty, 162 Mich. 492, a similar situation was involved. Houlihan and Fogarty had joined in a lease with a mining Company, in which their interests were stated. Litigation afterwards arose between Houlihan and Fogarty, whereby the former claimed to own the entire interest to the exclusion of Fogarty. It was claimed that the recital contained in the lease operated an estoppel and prevented the assertion of these

rights, but this Court held that the lease did not have that effect, saying:

> "Do these options and leases create estoppel by deed? The lessor is estopped against the lessee from asserting ownership of a smaller interest, but not from asserting title to a larger interest than is expressed. There is no covenant whatever with the co-lessor. The action in this case is not founded upon the mining option and lease but is collateral to it, and facts recited or admitted in such instrument do not operate by way of estoppel in this action. 16 CYC 721, and notes; 11 Am. & Eng. Enc. Law (2d Ed), p 401, and notes."

The question of adverse possession in this case involves two principles:

(a) The right of a grantor to obtain title against his grantee by adverse possession; and

(b) The right of a tenant in common to obtain title by adverse possession against his co-tenant.

The law is well settled that a grantor may obtain title against his grantee by adverse possession.

Harbach vs. Boyd, 89 N. W. 64;

Chatham vs. Lonsford, 149 N. C. 364; L. R. A.

from asserting possession by his covenant of title.

1 CYC 1040.

Pald vs. Pald, 84 Mich. 350.

In Chatham vs. Lonsford, Supra, it is said:

"The grantor in a deed is not thereby estopped from asserting possession by his covenant of title.

In Snyder vs Snover, 56 N. J. Law, 20, it is said:

"There is no legal principle which prevents a man who has conveyed a piece of land from again acquiring title to it in the same manner as other persons might."

In 1 CYC 1040, it is said:

"While, as stated in a preceding section, the continued possession of land by the grantor thereof after execution of a deed is presumed, in the absence of any showing to the contrary, to be in sub-

ordination to the title of the grantee, it is none the less true that the conveyance does not of itself prevent the grantor from acquiring title by adverse possession against his grantee. The covenant of warrant contained in the deed will not defeat title by limitations acquired after the deed. Such title is no breach of the covenant, which cannot be extended to cover future laches of the grantee whereby he loses the title conveyed to him."

The right of the grantor to obtain title against his grantee by adverse possession seems to be well recognized, but the authorities differ as to the evidence required to show an adverse holding.

The following have been held to be acts amounting to an adverse holding:

"Subsequent reentry by the grantor, making leases, paying taxes and improving the property, constitute an adverse holding by the grantor. Waltermeyer vs. Baughman, 63 Md. 200; Watson vs. Gregg, 10 Watts, (Pa) 289, 36 Am. Dec. 176. Leasing the property to a third person, disavowing the sale, and entry and occupation by the lessee, amount to an adverse holding. Pipher vs. Lodge, 4 Berg. & R. (Pa) 310. Where the grantee's heirs leave the land, and the grantor places a tenant on it and proves possession continuous for the statutory period, it is erroneous to charge that the putting out of the tenant was not an ouster unless the grantor intended to commit an ouster. Pipher vs. Lodge, 4 Serv. 'R. (Pa) 310. Remaining in possession for the statutory period, openly claiming the land as his own, will also vest title by adverse possession in the grantor. Meeks vs. Garner, 93 Ala. 17, 8 So. 378, 11 L. R. A. 196."

In deciding whether the grantor renounced the rights of his grantee, and whether such action was brought to the knowledge of the grantee, it must be borne in mind that Michael Donohue has always claimed that he did not execute the deed in question, and therefore could not have been expected to take any particular notice of Vosper's rights or to advise him of the adverse claim which he was asserting. He did this not only as against

Vosper but against the entire world by continuing in possession, using and occupying the property, and paying taxes thereon, and treating it as his own, and it would be entirely unreasonable under the circumstances in this case to expect that he would have treated Vosper any differently from the world at large, because he was entirely ignorant of Vosper's interest in the property.

The right of a tenant in common to obtain title by adverse possession against his co-tenant is well established in Michigan, and little more can be said on the subject than is contained in the case of Fuller vs. Swensberg, 106 Mich. 306, where it is said:

> "The rules respecting the acquisition of title by adverse possession as against a cotenant have been fully discussed by this court in numerous cases.
> * * *
>
> "In Bubois vs. Campau, 28 Mich. 304, the record was silent as to any acts or declarations accompanying the entry. The trial court instructed the jury that—
>
> 'If they found that Joseph Campau had occupied the property for more than 20 years, without any claim by the plaintiffs or their ancestors to a share of the rents and profits, and without actual acknowledgement of the rights of the plaintiffs or their ancestors, and with the knowledge of the latter, then they are well warranted in presuming anything in support of defendant's title, and they may presume either an actual ouster of the plaintiffs and their ancestors by Joseph Campau, or a conveyance by them to Joseph Campau. Joseph Campau being in possession, he and his heirs are presumed to have had a good title, and the burden of proofs is upon the plaintiffs to show title in themselves.'
>
> "This instruction was approved, and the judgment affirmed. Mr. Justice Campbell, with whom Mr. Justice Graves concurred, held that upon such facts the inference or presumption of title was one of law, while Mr. Justice Christiancy held it to be one of fact for the jury. Mr. Justice Cooley concurred with Mr. Justice Christiancy, but asserted to the affirmance of the judgment upon the ground that under any charge that could have been properly

given in the case the jury should have returned the verdict which they did, and that any different verdict would have been set aside as unwarranted."

"In Campau vs. Dupois,—

'Where one of several heirs had taken exclusive possession of land to which all were entitled as tenants in common, and had improved it without interference from the others, though they lived in the immediate neighborhood, and no possessory action was brought by them, or by their heirs or representatives for more than 25 years after their death, it was held that no possession could properly be found that was not adverse and exclusive within the statutory period of limitation, and that there should be no recovery in the right of the excluded parties.'

"In Sands vs. Davis, Sands entered under a quit-claim deed from Filer, claiming the entire title, and it was held that he owed no duty to the other tenants. In Highstone vs. Burdette, the court would seem to have observed the rule as contended for by Mr. Justice Christiancy in Dubois vs. Campau.

"The present case is here on appeal from a chancery decree. Here there was an entry under a deed which purported to convey the entire estate. The deed is supplemented by testimony clearly tending to show that the entry was under a claim of ownership of the whole property; that defendant's grantors bought, and intended to buy, the entire interest; that this claim of ouster and adverse possession had been consistently maintained from 1863 to the commencement of this suit; that until 1884 neither complainants nor their grantors ever asserted any claim to any interest in the premises, and after the time seven years elapsed before any proceedings were instituted; that prior to 1876—a date beyond the statutory period—not only had Laimer entered, but White, Moon, Pelton and Manfold entered; Pelton and White retired; Cary and Collins and Barnes acquired interests and entered upon the premises; and all these parties entered under conveyances giving them, with the parties in actual possession, the entire estate. The quo animo of the original entry and of these subsequent entries does not depend alone upon the conveyances. The fact is not disputed. * * *

"Many of the authorities hold that an entry un-

der a conveyance which purports to convey the entirety is equivalent to an express declaration on the part of the grantee that he enters claiming the whole to himself, and is such a disseisin as sets the statute in motion in favor of the grantee. Freem. Coten, 224; 11 Am. & Eng. Enc. Law, 1114. Other authorities hold that the statute does not begin to run until the cotenant has had notice or knowledge of the ouster. 3 Shars. & B. Lead Cas. Real. Prop. 121. But it is not necessary that actual notice be shown or brought home to the cotenant. It is said in Packard vs. Johnson, 57 Cal. 180, that plaintiff was ousted from the point of time when he became aware of such claim, or (at the very least) from the time when, as a prudent man, reasonably attentive to his own interests, he ought to have known that his cotenant asserted an exclusive right to the land. Whichever rule is applied, the full statutory period has run against complainants, for it must be conceded that before the expiration of the 15 years a prudent man, reasonably attentive to his own interests, ought to have discovered that defendant's grantors had asserted an exclusive right to his parcel of land.

See also Payment vs. Murphy, 141 Mich. 626.

In Lloyds vs. Mills, (W. Va.) 63 S. E. 1094, 32 L. R. A. (NS) 702,

It was held if one tenant gives a land contract to a stranger covering the entire tract, and not merely his interest therein, and the purchaser enter into actual possession, an ouster of the other tenant's possession for the statutory period will bar the rights of the other tenant, without other notice or adverse claim, and that a quit-claim deed for land is good color of title on which to base adverse possession.

There is cited in the notes to Lloyd vs. Mills numerous cases supporting this doctrine.

The notes to that case also cite numerous authorities holding that:

"A conveyance to a stranger by one cotenant of an estate in fee, and an entry and continued possession under such conveyance, are open and unequivocable acts of ownership, and of such a nature

as to give notice to the other cotenant that the entry and possession are adverse to him."

One in possession of property may buy an outstanding claim without acknowledging the same or losing his adverse title.

In Ripley vs. Miller, 165 Mich. 47,

this question is disposed of in the following language:

"It is significant here that Johnson was in possession of the premises, claiming to own the same, at the time he entered into the land contract, and that the land contract did not expressly give him the right of possession. The doctrine is well established that one in possession of land, claiming to own it, may buy in outstanding claims of title without abandoning or impairing his own, or acknowledging the validity of the title bought.

In 1 CYC 1016, occurs this language:

"With the exception of at least one decision, in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupt the continuity of his possession, it seems to be very generally conceded that an adverse occupant may purchase an outstanding title without thereby interrupting the continuity of his possession. A party, it is said, may very well deny the validity of an adverse claim of title, and yet choose to buy his peace at a smaller price than be at a great expense and annoyance in litigating it'—citing many cases including the two Michigan cases above referred to.

"Se also Elder vs. McClaskey, 70 Fed. 529-547 (17 C. C. A. 251).

"Adverse possession is not broken by negotiating with other claimants, if there is no waiver or nonclaim on the occupant's part. The tax deed is not before us. We must presume that it was color of title."

CONCLUSION

It is therefore submitted that a Decree should be entered quieting Complainant's title to the one-quarter interest in these lands claimed by Vosper and his grantees.

A. H. RYALL,

~~Solicitor~~ Attorney for Plaintiff in Error.

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TABLE OF CASES CITED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

Martin Donahue, *Plaintiff in Error,* vs. Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin, and Buffalo Iron Mining Company, *Defendants in Error.*	No. 445 In Error to the Supreme Court of the State of Michigan.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

What purports to be a statement of the case is plaintiff's brief is erroneous in several respects, and is not at all a full statement of the facts in the case. Without calling attention to any particular errors, I desire to make an independent statement of facts.

The material facts in this case are few and are briefly but fully stated by the learned Circuit Judge in his

opinion, found on pages 25 *et seq.* of the Record, and also in the opinion of the Supreme Court of Michigan, found on pages 75 *et seq.* of the Record.

Probably the only facts really pertinent to be considered are those stated in my brief heretofore filed in support of motion to dismiss the writ of error.

But, as the facts stated in the evidence and in the opinion of the courts, are stated in connection with other material facts and circumstances, it may be well to briefly give a more full history of the case.

About 1890 Michael Donahue, then living in Iron River, in the Upper Peninsula of Michigan, claimed to be in possession of the land described in the bill, and to have been in possession of it since about 1883. He had entered upon the land, claiming that it was public land of the United States subject to pre-emption, and that he had a right to acquire title thereto under the pre-emption laws. As a matter of fact, this land, together with a large quantity of other land, had before been selected as applicable to a grant of 200,000 acres made to the state of Michigan, to aid in the construction of a ship canal between Portage Lake and Lake Superior, being an act of Congress approved July 3, 1866 (14 Statutes at Large, page 81.)

A former grant of 200,000 acres for the same purpose, made by act of Congress approved March 23d, 1865, (12 Stat. at Large, 519, 520), had been conferred by the state of Michigan upon the Portage Lake and Lake Superior Ship Canal Company, and this act of 1866 provides that this grant shall inure to the benefit of that same company.

Selections were made, pursuant to the act of Congress, and the lists thereof were approved by the Secretary of the Interior and filed in the General Land Office. The list containing the land involved in this case was

certified under date of May 19th, 1871, (Record, page 69.)

Under decree of foreclosure of mortgages given by the original Canal Company, the lands were purchased by a new corporation called the Lake Superior Ship Canal, Railway and Iron Company, which for brevity is hereinafter called the Canal Company, and the title became vested in that company in May 1877. (Record, pp. 70, 71.)

Before the selection of these lands under the Canal Grant, Congress in 1856 made a grant of lands in the state of Michigan to aid in the construction of a number of railroads and, among others, one from *Marquette,* Michigan to the Wisconsin State line, and one from *Ontonagon,* Michigan to the Wisconsin State line. (11 Stat. at Large, 21.)

It appears in the record, and in the cases cited by the plaintiff to-wit: *Donahue v. Ship Canal Co.,* 155 U. S., 386, and *Cunningham v. same,* ib., 354, that the located line of these two roads intersected and overlapped near the Wisconsin state line, and that the lands involved in this case had been selected under said grants and were within the overlapping limits, or what is known as the common limits, and that, if the two railroads had been constructed in accordance with the act of Congress, each railroad company would have acquired the title to the undivided half of these lands. Neither company, however, ever constructed any road, so far as to obtain any claim thereon. No extension of time had been granted for the construction of either road and it was assumed by the Interior Department that the grant applicable thereto had lapsed and that the lands at the end of ten years became public lands of the United States and subject to be disposed of as such, and they were therefore certified to the State under the Canal Grant above mentioned.

Before the selection under the Canal Grant, the Gover-

nor of Michigan had executed releases, for the purpose of revesting the title to the lands in the United States, but as was held by this court in the cases above cited, the release of lands applicable to the railroad from *Marquette* to the Wisconsin state line was duly authorized by the legislature and such release was valid, whereas it was held that the release of lands applicable to the road from *Ontonagon* to the Wisconsin state line was not authorized and that the same was invalid. It was therefore held that the title to the undivided one-half of this, and other lands similarly situated, still remained in the state for the purpose of the railroad grant, while the title to the undivided one-half became revested in the United States and did pass to the Canal Company under the Canal Grant.

It is therefore evident that the land, at the time Michael Donahue claims to have taken possession, was not subject to preemption or homestead at all, or to any other disposition by the Interior Department, as public lands, because the title to the undivided one-half was in the state in trust for railroad purposes, and the other undivided half had become completely vested in the Canal Company.

In March 1889 numerous persons, (among them Michael Donahue,) had applied to enter various parcels of land within these railroad grants under the homestead and preemption laws, and claimed to be in possession of the lands as required by said laws.

March 2nd, 1889, by act approved on that date, Congress declared a forfeiture of land grants made in Michigan for all unconstructed railroads. The grant for the railroad from *Ontonagon* to the Wisconsin state line was among those declared forfeited. That for the road from *Marquette* to the Wisconisn state line had already been duly surrendered, as before stated. By the same act the

title of all persons who had made cash entries within those limits, and of all persons claiming under state selections (including the Canal Grant) was confirmed, excepting as to those lands on which there were bona fide preemption or homestead claims, asserted by actual occupation of the lands, on the first day of May 1888, (25 Stat. at Large, 1008.)

December 18th, 1890, at the instigation of the persons claiming as preemptors and homesteaders, (See opinion of court, Record, page 76, and Vosper's testimony, at page 64,) a bill was filed by the United States in the Federal court, against the Canal Company and certain grantees setting up that all these lands were lands of the United States, subject to entry under the homestead and preemption laws, and praying for an injunction to restrain the Canal Company and its grantees from cutting and removing the timber therefrom. (Record, page 45.) The Canal Company by its answer alleged that all the lands selected and approved to it, as aforesaid, had become vested in said company, by virtue of the granting act and approval of the selections so made, or at least under the confirmatory provisions of the forfeiture act of March 2, 1889, and that none of said preemption or homestead claimants was within the exception of the confirmatory act. (Record pages 45 and 46.)

An injunction was first issued to restrain the Canal Company and its grantees from removing any of the timber, particularly the pine timber, but the injunction was afterwards modified and discharged, on the Canal Company and its grantees giving bond to account for and pay for all timber that should be removed if they should not maintain their title, and the timber on these lands, including the land in question, was cut and removed by them.

Pending the suit, the Donahue and Cunningham cases

were decided by this court, and it was held that the title of the Canal Company to the lands so selected was confirmed by the act of March 2, 1889, except as against bona fide pre-emption and homestead claims, asserted by actual occupation of the land May 1st, 1888; (155 U. S., 354 and 386) which left the question to be determined in the equity suit of the United States what, if any, of said lands came within the excepting clause of the act.

The homestead and preemption claimants soon after this decision filed their application with the United States Land Office to prove their settlement and occupancy, claiming that the act of March 2, 1889 confirmed in them a *title* to the land. Among the others, Michael Donahue filed his Application to prove his claim to the lands involved in this suit.

The defendant Vosper was employed as attorney to defend these claimants and among other Donahue, in the suits that had been commenced against them by the Canal Company, and also to prosecute their claims in the Interior Department. Vosper had already followed the case of Donahue to this court and had procured the reversal of a judgment which had been rendered against him, upon a verdict directed by the court, and a remand of the case for a new trial. (Vosper's Testimony Record pages 61 to 67.) For his services, already rendered to Donahue in these matters, and the expenses incurred, and for services to be rendered and expenses to be incurred, Donahue excuted and delivered a warranty deed to Vosper for the undivided one-fourth interest in the land claimed by him, (Rec., pages 39, 40 and 63.)

The execution of this deed was denied by the plaintiff, but it was established by the evidence of the defendant Vosper, (and other evidence, which is omitted from the printed record under Rule 6,) and was found to be a fact by the learned Circuit Judge in rendering his deci-

sion. (Rec., pages 27, 32.)

Also opinion of the Supreme Court, (Rec., pp. 78 & 79.)

In the meantime the title of the Lake Superior Ship Canal, Railway and Iron Company had been conveyed to the Keweenaw Association Limited, a partnership association formed under the laws of Michigan. (Rec. page 47,) Said Association was admitted as a defendant in the case and by leave of the court a supplemental cross bill was filed by said Canal Company and said Association making all of the claimants, including Michael Donahue, parties cross defendant, claiming the title to all of said lands, and praying for a decree quieting its title as against said defendants, including Donahue. The defendant Vosper was made a party to said cross bill as claiming an interest under said Michael Donahue. (Rec. pages 46 and 47.)

The issue, therefore, to be tried between the Canal Company and the Keweenaw Association Limited, complainants in the cross bill, and Michael Donahue and others, claiming as homesteaders or pre-emptioners, was whether in each case the persons so claiming were bona fide homesteaders or pre-emptioners, asserting their claims by actual occupation of the land on the first day of May 1888. Without trying that issue a number of the claimants, including Michael Donahue, and Benjamin Vosper claiming under him, signed a written consent, authorizing their attorneys to admit in open court that they had no title to or interest in the land, and to consent to the decree against them which was thereafter made. (Record, pages 66 and 67.)

On the 17th of November, 1896, by such consent given in open court, on the part of the cross defendants named, and also on the part of the United States, a decree was entered in the Federal court in which said cause was pending, in accordance with such sitpulation and consent,

whereby it was adjudged that the bill of the United States should be dismissed, as to the lands so described, and that the title to said lands was, at the time the bill was filed (Dec. 18th, 1890) fully and completely vested in the Lake Superior Ship Canal, Railway and Iron Company, "as in part satisfaction of the grant to the state of Michigan by act of Congress of July 3, 1886," and that the title was, at the time of the entry of the decree, fully vested in said Keweenaw Association Limited, "and that neither the United States of America nor any of the defendants aforesaid consenting to this decree has any right, title or interest therein." It declared the title of the Keweenaw Association Limited quieted as against all said parties, and as against the United States, and provided that said decree should "stand and operate as a release and conveyance from the United States, and from each and every other of the said defendants, of all right, title and interest to said lands." The land so claimed by Michael Donahue, the title to which was so quieted in the Keweenaw Association Limited as against him, was described in said decree and was the same as is involved in this case. (Record pages 21, 23.)

This decree was entered pursuant to a compromise agreement made between the Keweenaw Association Limited and Michael Donahue and Mr. Vosper as affecting the land claimed by them, by which a certain sum of money was to be paid and the land, stripped of its timber, was to be conveyed by the Keweenaw Association Limited to Michael Donahue. (Rec. pages 43, 65 and 66.)

By deed executed and acknowledged November 19, 1896, the Keweenaw Association Limited conveyed the land involved in this suit to Michael Donahue. (Rec. pages 1 and 2.)

December 3rd, 1896, Michael Donahue executed and delivered to the complainant, Martin Donahue a quit claim

deed, quit-claiming to said Martin Donahue, for the consideration of One Dollar ($1.00,) as expressed in the deed, the lands involved in this suit.

ARGUMENT.

I.

Some questions are raised by the plaintiff in his brief which I understand cannot be considered or reviewed by this court. They are the claims of the plaintiff numbered 2, 3 and 4 on pages 3 and 4 of his brief, to-wit:

2. That the plaintiff was a purchaser in good faith without notice of the defendant Vosper's claim to the land.

3. That plaintiff was not charged with constructive notice of Vosper's claim, because Michael Donahue had no title when he gave the deed to the defendant Vosper, and subsequently acquired title and deeded to the plaintiff.

4. That the plaintiff acquired the title to the property by adverse possession of himself and of his grantor.

Neither one of the above mentioned points is covered by the plaintiff's assignments of error filed with his application for a writ of error. Nor is either of them what is known as a Federal question, which is necessary to give jurisdiction to this court. Plaintiff seems to assume that if the point specified in his assignment of error, and which is the only one that can possibly involve a Federal question, is decided against him, the court may still proceed to consider other questions, which he claims were erroneously decided, and reverse the case on one or more of those grounds. I do not understand that such is the law. The court can and will consider nothing but Federal questions, which were properly raised and which were decided by the State court against the contention of the

plaintiff.

Murdock v. City of Memphis, 20 Wall., 590.

II.

CONSTRUCTION OF THE DECREE OF THE FEDERAL COURT.

The only assignment of error made by the plaintiff appears on page 39 of the Record printed for this court, and is as follows:

"That the said Supreme Court of the State of Michigan was in error in holding and deciding that the said statute of July 3, 1866, and the said decree of the Circuit Court for the Western District of Michigan, Southern Division, dated November 17th, 1896, did not fully and effectually vest in the remote grantors of this plaintiff in error, to-wit, the Keweenaw Association Limited, a full, perfect and complete title in said lands, described in the said bill of complaint, and thereby extinguish and cut off all the right, title and interest of the said defendant Benjamin Vosper and of his grantee, and persons claiming through him, to-wit, the defendants Fred H. Abbott, Maurice J. Tonkin, and the Buffalo Iron Mining Company, in and to said premises and every part thereof, so that by virtue of the mesne conveyances set up and referred to in said bill of complaint this plaintiff in error would and did acquire an absolute and perfect title to said premises to the exclusion of the said defendants in error herein."

I take it that this assignment of error raises the only question which can be considered by this court.

1. *The claim made in this assignment of error was not made in any proper manner before the trial court or Supreme Court of Michigan.*

I have discussed this matter quite fully in my brief, filed in this cause in support of the motion to dismiss the

writ of error, and refer the court to that brief without further discussion here.

2. The construction placed by the Supreme Court of Michigan upon the decree of the Federal court, was practically what the plaintiff in the assignment of error claims it should have been, except that the Michigan Supreme court did not draw the same conclusion of law from that construction that plaintiff seems to have drawn. His contention is that the court held, in deciding that case, that the statute referred to and the decree of November 17th, 1896 did not fully and completely *vest* in the Keweenaw Association Limited a full and complete title to the lands described in the bull of complaint.

The court did decide, not that the decree *did vest* the title in the Keweenaw Association Limited, but held that it was determined and adjudicated by the decree that the Keweenaw Association Limited *had the absolute and complete* title to the land in *fee simple,* and that its predecessor in title, the Lake Superior Ship Canal, Railway and Iron Company, *had* the full and absolute title *before the suit was commenced.*

The suit was not commenced or prosecuted for the purpose of *divesting* any title and *vesting it in the plaintiff* in that suit, but was prosecuted for the purpose of obtaining a judicial declaration as to what party *was already,* at the time of the commencement of the suit, the owner of the land and had the absolute fee simple title. The complainant, the United States, by its bill claimed to be the absolute owner of the land in fee simple. The defendant, the Canal Company, by its answer, and by its cross bill, claimed to be the absolute owner in fee simple. By the supplemental cross bill, whereby Donahue and the defendant Vosper were made defendants, it claimed and sought an adjudication of the court that at and prior to the commencement of the suit the Canal Company,

was the absolute owner in fee simple, and that pending the suit that *absolute fee simple* title *had been transferred* by deed to the Keweenaw Association Limited.

The United States did not by its bill admit that the defendants the Canal Company and the Keweenaw Association Limited, or either of them, had any title to or interest in the land, and of course did not ask or seek to have any title transferred from those companies to the United States.

Neither the Canal Company, nor the Keweenaw Association Limited, admitted that there was any title, either in the United States or in Donahue or Vosper, but sought by its cross bill a determination of the court that it, the Keweenaw Association Limited, *was the absolute owner* of the land in fee simple, and not that any title or interest be transferred from the United States, or Donahue, or Vosper, and *vested in* it, said Association.

The decree of the Federal court of November 17th, 1896 did not purport to vest the title, or to *vest* any title in the land, in the Keweenaw Association Limited, but did decide that the absolute title in fee simple *was* vested in that Association, and it did adjudicate, as a matter of fact and law, that neither the United States nor Michael Donahue nor Benjamin Vosper had *any* title to or interest in the land whatever.

The Michigan Circuit Court, and the Michigan Supreme Court, gave that construction to the decree of the Federal court. By the decree it was determined "that said Michael Donahue at the time of the execution of the said warranty deed (the deed to Vosper) was not the owner of said lands, nor of *any interest therein*, but that the Keweenaw Association Limited * * * was at *that time* the owner in fee simple of said lands."

And the Michigan Supreme Court, in its opinion (Record, page 79) takes the same ground. After quoting

from the decree of the Federal court the language which is quoted so many times by plaintiff's counsel in his brief, the court says:

> "Now, if the title was complete in the Canal Company at the time of the commencement of the suit, (Dec. 18th, 1890, which ante-dates the time of the warranty deed to Vosper,) and passed from it to the Keweenaw Association Limited before the decree, how could the decree convey any interest in the hand from Donahue and Vosper to the Keweenaw Association Limited? And we do not think that it can be contended that Vosper was adjudged to have no title as a result of the release clause in the decree, since there was nothing to be released if he had no interest."

The construction placed by the court upon the decree is exactly in accordance with the language of the decree itself, and is exactly in accordance with the claim made by the plaintiff in his bill before the State court, where in construing the decree he says "that by virtue of said decree * * * the said Keweenaw Association Limited was, on the 2nd day of October, 1909 the absolute owner of said premises and that neither the said Michael Donahue nor the said Benjamin Vosper then had any interest in or title to said premises."

In the above quotation the plaintiff in his bill makes an error in the date. What he means is that by virtue of the decree the Keweenaw Association Limited was the absolute owner and that neither Vosper nor Donahue had any title to or interest in the premises. (Rec. p. 4, Par. 11 of Bill.)

The decree of the Federal court sets forth that the defendants named (including Michael Donahue and Benjamin Vosper,) by their respective solicitors, duly authorized, come into court "and acknowledge that the

said Keweenaw Association Limited is, and the said Lake Superior Ship Canal, Railway and Iron Company, was, at the time of the commencement of this suit the lawful owner in fee of the lands hereinafter described, part and parcel of the lands described in the original bill filed by the United States against said companies, and that neither the United States nor the said * * * Michael Donahue, * * * Benjamin Vosper, * * * nor any of them, are entitled thereto, or to any interest therein." And thereupon the court, by their consent given in open court, did, "order, adjudge and decree that the title to the lands hereinafter described, (which included the lands in this suit,) part and parcel of the lands described in the original bill of the United States as aforesaid, at the *time of the commencement of this suit*, was fully and completely vested in the Lake Superior Ship Canal, Railway and Iron Company, * * * and has since the commencement of this suit become, *and is now*, fully and completely vested in said Keweenaw Association Limited, and that neither the United States of America, nor any of the defendants aforesaid consenting to this decree had any right, title or interest therein." (Rec. p. 22.)

The language of this decree is perfectly plain, and the construction given to it by the Michigan court was exactly in accordance with that language. Not only that, but it was exactly in accordance with the claim made by the plaintiff in his bill. But in his brief he attempts to claim that, notwithstanding the language of the decree, the defendant Vosper did have an interest in the land at the time the decree was rendered, and that the decree divested him of that interest and vested it in the Keweenaw Association Limited. In his bill of complaint he alleges that that decree determined and adjudicated the neither Vosper nor Donahue had any right, title or interest in

the land whatever. In his brief here he urges that the language of the decree of the Federal court which says that neither Vosper nor Donahue had, or ever did have, any title or interest in the land, should be construed as determining that Vosper did have an interest in the land, of which he was divested by the decree and which was, by the decree, vested in the Keweenaw Association Limited.

Plaintiff's brief is largely taken up with argument and citation of authorities to show that the decree of the Federal court was conclusive, and that the facts therein adjudicated cannot be disputed by any of the parties thereto.

We agree with the plaintiff in that contention, and we insist that the facts adjudicated in that decree relate to the title to the lands at and before the time the decree was pronounced and cannot be disputed by the plaintiff in this case. He cannot be heard to urge that at the time of the decree Vosper had an interest, which was transferred by the decree to the Keweenaw Association Limited.

I understand from some portions of the brief of plaintiff that his claim is based upon language used in the decree in which the court, after declaring the title to be absolute in the Keweenaw Association Limited and that neither Donahue nor Vosper had, or ever did have, any title to or interest in the land, and quieting the title of the Keweenaw Association Limited, inserted, as is usual in such cases, that the decree should operate as a release and conveyance from the United States, and from each and every other of the defendants, "of all right and title" to said lands and that the decree might be recorded in the records of the proper county.

This was not holding or deciding that Vosper or Donahue had any title or interest, but was a provision for

placing the fact on record, that all claim of title and right in the land had been adjudicated against them.

The claim is made that the clause referred to, by reason of the use of the words "release and conveyance," conveyed something from Vosper at least to the Keweenaw Association Limited; but how it could be held or claimed that a decree which declares that Vosper has no title or claim to the land could, by using the words "release and conveyance," have the effect to convey some title or interest from Vosper to the Keweenaw Association Limited, is something beyond my comprehension. The words "release and conveyance" must be taken and construed in connection with the rest of the decree, and if they amount to anything at all it merely means that the defendants shall release and convey to the Keweenaw Association Limited, (which had the absolute and full title to the land,) all claim of right or title to the land, or, in other words, abandon or surrender all claim to the land whatever.

The claim of the plaintiff is that not only was the title to the land quieted in the Keweenaw Association Limited by the decree, but that it *transferred* to that Association all the rights of Vosper against Donahue under the covenant contained in the warranty deed. The decree does not purport or assume to transfer to the Keweenaw Association Limited Vosper's rights against Donahue under that covenant, but merely to quiet the title in that Association. Vosper's claim against Donahue for damages for breach of the contract, or his claim against Donahue to have any title which Donahue might subsequently acquire inure to his benefit, was certainly not transferred by the decree, nor was there any claim for any such transfer in the cross bill. The Keweenaw Association Limited had the absolute title in fee simple to the land. It could not by the decree, or even by deed, or in any other way,

acquire any additional title, and it certainly did not by the decree acquire Vosper's right to claim damages against Donahue under the covenant in his deed. It will not be claimed for a moment that the Keweenaw Association Limited, by virtue of the decree, could have maintained an action for damages against Michael Donahue for the breach of covenant in the deed to Vosper.

To say that the decree against Vosper and Donahue, who had no title to the land, transferred to the Keweenaw Association Limited, which had an absolute title in fee simple to the land, the right of Vosper against Donahue to have any title that Donahue might afterwards acquire inure to its benefit, is an absurdity. It would mean that if Donahue should ever thereafter acquire title to the land, that title would inure to the benefit of the Keweenaw Association Limited, which had the absolute title already, no such title could ever be acquired by Donahue, except under and through a conveyance from the Keweenaw Association Limited itself.

As stated by the Circuit Judge in his opinion (Rec., page 28,) "The right which accrued to Vosper under the breach of the covenant of warranty found in the Donahue deed, was a mere right of action for damages for the breach up to the time that Donahue acquired title under the deed to him from the Keweenaw Association Limited, which right of action no one claims was transferred to the Keweenaw Association Limited by operation of the decree." But when Donahue did acquire the title, November 17th, 1896, that very instant the title inured, as to the undivided one-fourth, to Vosper's benefit. Up to that time he had no interest in or claim upon the land whatever which could be transferred or conveyed by him, or by virtue of any decree. His right and interest in the land attached by estoppel under what, up to that time, had been and still was, a broken personal covenant.

17

It is urged and repeated by plaintiff in his brief, that the right of Vosper under the covenant was an interest in the land, that the covenant was one running with the land.

No argument seems necessary to prove that Donahue, having no interest whatever in the land on the 29th of December 1894, could not, by any kind of a deed or conveyance yest and interest in the land in Vosper. The deed contained a covenant that Donahue was at that timewell seized of the land as of a title in fee simple, Donahue may have, and probably did believe at that time that that was true; and undoubtedly Vosper, according to his understanding of theQ facts and law, believed it to be true. But it turned out, as held by the Federal court, that it was not true, and therefore the covenant was broken as soon as it was made, and Vosper at once had a right of action thereon. But he also had the right to wait and see whether Donahue would thereafter acquire a title to the land, and if he did, to claim the benefit of that title, to the extent of his undivided one-fourth. A few days after it was determined by the decree that Donahue had no interest in the land and that Vosper, claiming under him, had no interest, and that the covenant of the deed was broken, Donahue did acquire the title from the Keweenaw Association Limited and that title at once inured, by estoppel, as to the undivided one-fourth, to Vosper's benefit.

It is claimed that the *covenant* runs with the land and therefore is an interest in land.

The covenant certainly does not run with the land, in the sense of being an interest in the land, because it is axiomatic that one who has no interest in land cannot by deed, or in any other way, give an interest in the land to another. The covenant operates as an estoppel against the covenantor and in favor of the covenantee and those

claiming under him.

It is true that the estoppel binds all persons claiming the land under the covenantor by conveyance subsequent to the making of his covenant. It is true also that the estoppel operates in favor of any person claiming the land under the covenantee; but neither the covenant nor the estoppel ever attaches to the land so as to make it an interest in the land until the covenantor, subsequent to the making of his covenant, acquires title.

The subsequently acquired title inured to the benefit of the grantee not specially by virtue of the covenant but by estoppel.

This estoppel may arise without any covenant.

The grantor in a deed, which sets forth, either expressly or impliedly, that the grantor had a title, will be estopped by such representation from ever afterwards denying that he had title, of the kind, quality and extent represented in the conveyance, even though there was none.

The Michigan decisions in every case apply the rule in regard to after acquired titles entirely on the ground of estoppel.

Shotwell v. Harrison, 22 *Mich.*, 409, *at p.* 413.
Smith v. Williams, 44 *Mich.*, 240-242.
Park Assn. v. Pere Marquette R. Co., 172 *Mich.*, 179-187.
Pendill v. Agricultural Society, 95 *Mich.*, 491-493.

In the case of Smith v. Williams there was no covenant of seisin. For that reason it was claimed that the subsequently acquired title would not inure to the benefit of the grantee. But the court says:

> "Where one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will

> not be suffered afterwards to acquire or assert a title and turn his grantee over to a suit upon his covenants for redress."

In the case of *Pendill v. Agricultural Society*, the court quotes from the case of *Jackson v. Waldron*, 13 *Wend.*, 178, as follows:

> "The principle of estoppel, as applicable to deeds, is to 'prevent circuity of action, and to compel parties to perform their contracts.' Thus, a party asserting in a deed the existence of a particular fact, and thereby inducing another to contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit."

And the Michigan Supreme court adds:

> "This doctrine is well supported. So, where the deed imports to convey a fee, though it lack a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire."

And the court quotes with approval from the case of *Van Rensselaer v. Kearney*, 11 *How.*, 325, in support of the proposition that the grantor is estopped to deny the matters set forth in the recitals of his deed, whatever may be the form of the deed.

It is also held by this court that the title inures on the principle of estoppel.

Irvine v. Irvine, 9 *Wall.*, 617.

In fact, the rule is settled in Michigan, that covenants in presenti, like a covenant against incumbrances, or a covenant of seisin and right to convey, are broken, if at all, as soon as made and are mere personal covenants, not running with the land.

Davenport v. Davenport, 52 *Mich.*, 587.
Guerin v. Smith, 62 *Mich.*, 369, 372.
Simons v. Diamond Match Co., 159 *Mich.*, 241-248.
Pease v. Warner, 153 *Mich.*, 140-151.
Matteson v. Vaughn, 38 *Mich.*, 373-375.
Sherwood v. Landon, 57 *Mich.*, 219, 223-224.
Lovejoy v. Potter, 60 *Mich.*, 95, 101.

In the case last cited it is expressly stated by the court that a covenant of seisin does not run with the land.

It is only where some estate is actually conveyed that any convenant contained in the deed can attach to and run with the land.

In *Brewster on Conveyancing*, section 217, it is said "that if the covenantor is not seized, or has no right to convey, nothing passes as an estate in which the covenants may rest and be transmitted to later owners."

In 11 *Cyc.*, 1080 and 1081, the rule is stated:

'A covenant which may run with the land can do so only when there is a subsisting privity of estate between the covenantor and the conenantee, that is, when the land itself, or some estate or interest therein, even though less than the entire title, to which the covenant may attach as its vehicle of conveyance, is transferred."

In the case of King v. Gilson, 32 Ill., 348, Gilson brought suit against King for damages for breach of warranty of seisin and good right to convey. The suit was brought for the benefit of a grantee of Gilson. King at the time of the deed containing the covenant of warranty had no title but subsequently acquired a title. It was held that the title inured to the benefit of Gilson and his grantee, and the question was whether that fact was a defense to the suit, or whether it could be urged in mitigation of damages. The court says:

> "The covenants of seisin and of good right to convey are broken, if at all, when the deed is de-

livered. They are personal covenants, not running with the land, and are *in presenti*. Their breach depends upon no future contingency."

It was held that the fact that the title subsequently acquired inured to the benefit of Gilson's grantee should go in mitigation of the damages.

See also *Pigg v. Cook*, 4 *Gilman*, 336;
Comstock v. Smith, 13 *Pick.*, 116.

It wll be sen that, although holding that the covenants of seisin and of right to convey and even the covenant for quiet enjoyment do not run with the land, and of course do not confer upon the grantee any interest in the land, where the grantor has none, yet all these authorities hold that a title subsequently acquired by the grantor inures to the benefit of his grantee.

These authorities effectually dispose of plaintiff's proposition that the covenant of warranty of Michael Donahue vested in Vosper an *interest in the land* which could be conveyed, as counsel says, "the same as any other interest in the land, and passes with any attempted conveyance by the original grantee."

See also 7 R. C. L., page 1103.

But the *estoppel* created by covenant, or by any other representation embodied in the deed, operates against the grantor and in favor of the grantee, and of all persons claiming under him.

The authorities cited by counsel relate to cases where the covenantee has assumed to convey the land to third parties, and the estoppel is held to have operated in favor of the grantee in such conveyances. As is said by the authorities, it operates in favor of those *claiming under the covenantee*. The Keweenaw Association Limited never claimed under Vosper or Donahue. Their

claim was adverse and the decree they obtained was obtained on the express ground that Vosper and Donahue had no interest in the land, and that the Keweenaw Association Limited was the absolute owner in fee simple,

In this case the claim of the Keweenaw Association Limited, and that of Donahue and Vosper, were adverse and were involved in litigation. When Vosper and Donahue decided that it was not worth while to prolong the litigation and further resist the claim of title set up by the Keweenaw Association Limited, they conceeded, as a matter of fact, that they had no title and that the Keweenaw Association Limited had the title and allowed decree to go against them to that effect. The decree itself recites that neither Vosper nor Donahue had any title, and that the Keweenaw Association Limited had the absolute title, and therefore the title of the Keweenaw Association Limited is quieted as against Vosper and Donahue. The decree, therefore, does not purport to transfer any title but expressly negatives the idea that there is any title or interest in Vosper or Donahue.

In my judgment, if there had been no litigation at all and the Keweenaw Association Limited, claiming title as against Vosper and Donahue had threatened them with litigation and they, looking the matter over and becoming satisfied that their claim was not well founded, had given a quit claim and release in settlement and compromise of their respective claims, and by said deed had recited the fact that the claim of title had been made by both parties and that Vosper and Donahue, being satisfied that they had no title, conceded and acknowledged that they had no right, title or interest in the land and thtrefore quit-claimed all right, title and interest to the Keweenaw Association Limited, such deed would not affect Vosper's rights against Donahue under Donahue's covenant. Vosper would still have a right of action

against Donahue for damages, or, in case of Donahue subsequently acquiring title, that title would inure to Vosper's benefit.

Plaintiff's counsel urges that if Vosper intended to retain his rights under the covenant, he should have seen that it was so provided in the decree in the Federal court. But there was absolutely no issue between Vosper and Donahue in that case. There was nothing in the pleadings under which the court could have made a decree to the ecect that if Donahue should ever thereafter acquire title to the land that title should inure to Vosper's benefit. In fact, the decree did not dispose of any issue or dispute that had arisen, or that might thereafter arise, between Donahue and Vosper. Of course the adjudication of facts by that decree was conclusive against both of them, but it did not attempt to pass upon their respective rights as against each other.

The case of *Devin v. Cty of Ottumwa,* 53 Iowa, 461; 5 N. W., 552, is cited by counsel on page 14 of his brief, in support of his claim that the rights of Donahue and Vosper as between themselves were disposed of also by the decree. In that case the two defendants, Devin and the City of Ottumwa had claimed title adversely to each other, and set up their claims adverse to each other in their answers. The decree found the title in the City of Ottumwa and of course disposed of the issue between the City and Devin.

No case is cited by counsel, and I apprehend that none can be found, holding that even a conveyance from the covenantee to the person who has the absolute title, given in settlement of a controversy between them, and in acknowledgement of his right, without assuming or attempting to convey a title, either transfers or cancels his rights under the covenant.

Plaintiff's counsel asserts, on page 18 of his brief, that

there is no evidence of any breach of the covenant of warranty in the deed to Vosper prior to the date of the decree November 17th, 1896.

As we have before stated, the covenant was a covenant of seizin, existing at the time of the conveyance. The decree determined absolutely and conclusively that at that time the covenantor had no title or interest in the land. It was conclusively established, therefore, that the covenant was broken as soon as it was made.

Counsel further states that this court, in the case of Donahue v. Canal Co., 105 U. S., 355, decided that Donahue was the owner of an undivided half interest in the premises.

This court decided no such thing. It did decide that he had the right to go to a jury upon his claim of being the owner or of having some interest in the land under the Forfeiture Act of March 2, 1889, and that therefore the direction of a verdict against him was erroneous. He was given by that decision the right to go to a jury on a new trial and establish his claim if he could. He, however, became satisfied that he could not establish it, acknowledged that he had no right or interest, and allowed the decree to go against him, which establishes absolutely and conclusively the fact that he did not have an undivided half interest, or any other interest in the land.

The decree in the Federal court, therefore, determined and settled the fact that the Keweenaw Association Limitd already had, and for a long time had held, an absolute title to the lands, and swept off from the record all claim of both Vosper and Donahue to such title, but did not affect the rights of Vosper as against Donahue under the covenants in his deed.

III

BY JOINING IN THE LEASE OF THE PROPERTY, THE PLAINTIFF IS ESTOPPED TO DENY

THE INTERESTS OF THE DEFENDANTS AS THEREIN SET FORTH.

There was a controversy between the plaintiff and the defendants as to the title. The plaintiff claimed to own the undivided quarter interest that the defendants claimed. (Rec., pp. 55 and 56.) He was desirous of having the property explored to prove its mineral value and to get it under lease, so as to produce a revenue, but he was disputing the conveyance under which Vosper and Abbott claimed. In order to get the property under lease, it was necessary in the first place to settle on the question of ownership. The plaintiff finally became satisfied to give up his contention and in December 1908 the parties all joined in an option for a lease, in which it was agreed that Vosper and Abbott each owned the undivided one-eighth of the land. (Rec., page 72.)

In March, 1910, the optionee having proved that the land had great mineral value, decided to take a lease of the property, whereby the lessee was to pay a royalty of at least Four Thousand Dollars ($4,000.00) per annum, and twenty-four cents per ton upon all non-Bessemer ore, and forty cents per ton on all Bessemer ore, that should be taken from the property. In that lease it was again *mutually agreed*, not only between the lessors and the lessee but between the lessors themselves, that the defendants Vosper, Abbott and Tonkin were the owners of interests amounting to the undivided one-fourth. (Rec., page 57.)

This agreement as to the title was necessary and was made by the plaintiff in order to induce the defendants Vosper, Abbott and Tonkin to join with him in the lease. It was a lease for thirty years, duly recorded, and of course was duly executed as a deed.

It was not merely an admission, which would be only

evidence of the fact, but a solemn *agreement* by *deed* binding the parties.

In the case of *Douglass v. Scott,* 5 Ohio, 195, at page 197, speaking of the force of an admission, the court, Lane J., says:

> "It (the admission) may be presumptive evidence only of the truth, and liable to be denied or disproved. But if made for the purpose of influencing the conduct, or of deriving a benefit to another, so that it cannot be denied without a breach of good faith, the law enforces the rule of good words as a rule of policy, and precludes the party from repudiating his representations and denying the truth of his admissions."

The agreement contained in the lease, and in the option, above mentioned, still stands good. The plaintiff in this suit does not ask to have it reformed; nor does he allege a single fact going to show that it should be reformed. After having realized the benefit of the agreement, and after the property has been proved to be of great value, on December 9, 1913, (Rec., page 1,) five years after giving the option, and two years and nine months after joining in the lease, he files his bill in a court of equity, asking the aid of the court in repudiating that solemn agreement.

The Supreme Court of Michigan might well have based the decision on that ground and for that reason, if no other, the decree should be affirmed.

IV

THERE ARE NO EQUITIES IN FAVOR OF THE PLAINTIFF IN THIS CASE, BUT THE EQUITIES IN FAVOR OF THE DEFENDANTS ARE VERY STRONG.

The defendant Vosper, from the year 1889 to 1896, expended a large amount of time and money in the endeavor to establish Michael Donahue's title to the land.

Martin Donahue, the plaintiff, was living with Michael on the land during that time and must have known what was going on. Michael seems to have been unable to furnish the money necessary for the expenses incurred by Vosper, or pay him for the time and labor expended by him, and in order to compensate him for his expenditures and professional services, already rendered and still to be rendered, he did the best he could by conveying and warranting to him an undivided one-fourth interest in the land, of which he claimed to be the owner. Vosper also understood that, under the Act of March 2, 1889, if Donahue could establish the necessary facts of residence, etc., that Act confirmed to Donahue a *title* to the land, and he was endeavoring to prove the necessary facts.

On the faith of that conveyance, knowing that if Michael then had a title it vested the undivided one-fourth in him, or, in case he had no title, if he should ever thereafter acquire title, that title, as to the undivided one-fourth, would inure to his benefit, Vosper continued his efforts, and continued to furnish money for expenses, until November 1896. At that time both Vosper and Donahue, becoming at least doubtful as to the result of the case, and being able to obtain from the Keweenaw Association Limited a sum of money, for the purpose of avoiding further litigation and expense, and in order to secure to Donahue something substantial by way of money, and a final title to the land without the timber, Vosper consented that the decree might be entered, against himself as well as against Michael Donahue.

By doing this he procured a substantial sum of money for Donahue, who recognized Vosper's right to one-

fourth thereof, and also procured for him a title to the land, which after many years has turned out to be exceedingly valuable. All these benefits were saved to Michael Donahue, and through him to the plaintic, by the efforts and expenditure of money of the defendant Vosper. As was stated by the learned Circuit Judge that heard the case: "It is clear that but for the efforts and money expended by Vosper, which represent the consideration for the deed, neither Michael nor Martin would have acquired any interest in the land." (Rec. page 27, original page 48.)

Every consideration of law, equity and justice demands that the decree of the Supreme Court of Michigan be affirmed.

DAN H. BALL,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 445.

MARTIN E. DONAHUE, PLAINTIFF IN ERROR,

vs.

BENJAMIN VOSPER, FRED H. ABBOTT, MAURICE J. TONKIN and THE BUFFALO IRON MINING COMPANY.

In Error to the Supreme Court of Michigan.

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

DAN H. BALL,
Attorney for Defendants in Error.

(25,235)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

Martin Donahue, *Plaintiff in Error.* vs. Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and the Buffalo Iron Mining Company, *Defendants in Error.*	No. 445 In Error to the Supreme Court of Michigan.

BRIEF FOR DEFENDANT IN ERROR IN REPLY TO PLAINTIFF'S BRIEF.

I.

In answer to my proposition that a Federal question was first claimed by the plaintiff in his petition for writ of error, counsel calls attention (page 4) to his reference in his bill to the proceedings in the Federal Court and also to the reference to those proceedings in the answer of defendant below; but there was no claim made in the

bill nor does it anywhere appear in the pleadings that the claim was made either before the Trial Court or the Supreme Court of Michigan that Vosper's right under his warranty deed to have any title that Donahue might thereafter acquire inure to his benefit was transferred to the Keweenaw Association, Limited, or that Vosper had any interest in the land which was transferred to said Association by the decree; on the contrary, as I have shown, it is alleged in the bill that the delree in the Federal Court adjudged that Vosper had no interest whatever therein.

II.

For the purpose of showing that the claim now made appears by the record to have been presented to the Trial Court and to the Supreme Court, counsel refers to the opinion of the Circuit Judge and also of the Supreme Court, stating that the claim was made by plaintiff below, and deciding that such claim was not well founded. But such claim in order to give jurisdiction to this court must have been made by the plaintiff below either in his pleadings, or in the evidence, or instructions asked for, or exceptions to the ruling of the court; in other words it must be a claim of right made by the pleadings, or at least one that could be properly made under the pleadings. Such claim must appear in the record otherwise than by a statement of the Court in its opinion that the claim was urged on the hearing. While the opinion of the Court in a certain sense is made by Rule 8, Section 2, a part of the record and may be examined to ascertain the grounds of the decision, yet a statement in the opinion that a certain claim was made before the Court does not take the place of a claim made in the record. (Otis vs. Steamship Co. 116 U. S. 541, and Gibson vs. Chouteau, 8 Wallace 314).

In this case the plaintiff seeks, by this statement in the opinions of the Circuit and Supreme Courts, to raise a question that was not involved in the issue before those Courts.

Plaintiff's counsel also states that the briefs filed in the State Supreme Court were largely devoted to an argument on that question and therefore claims that the record shows that such claim was made, (plaintiff's brief page 5); but the briefs and argument constitute no part of the record and the assertion of a claim of right merely in the brief or argument is not sufficient to confer jurisdiction on this Court to review the decision relative to a claim so made. (Zadig vs. Baldwin, 160 U. S. 485 and R. R. Co, vs. Post 4 Wallace 177).

III.

It is stated by counsel (brief page 8) that the legal question involved has been seriously discussed by many courts and that the conclusion arrived at by some of these courts is adverse to the conclusion adopted by the Michigan courts, and therefore, it is claimed that the writ should not be dismissed or the decision summarily affirmed. If by the "legal question" he means the question as to whether a decree like that of the Federal Court set up in the pleadings in this cause has the effect to transfer and take away from the grantee under a warranty deed, made by a grantor who had no title, his right to have any title subsequently acquired by his grantor inure to his benefit, I submit that no decision of any court can be found sustaining such a proposition, nor can any decision be found which holds that a decree adjudging that the defendant has no title or interest in the land should be construed as adjudging that the defendant *did* have a title or interest in the land and that such interest was transferred to the oppostie party. That is the only legal

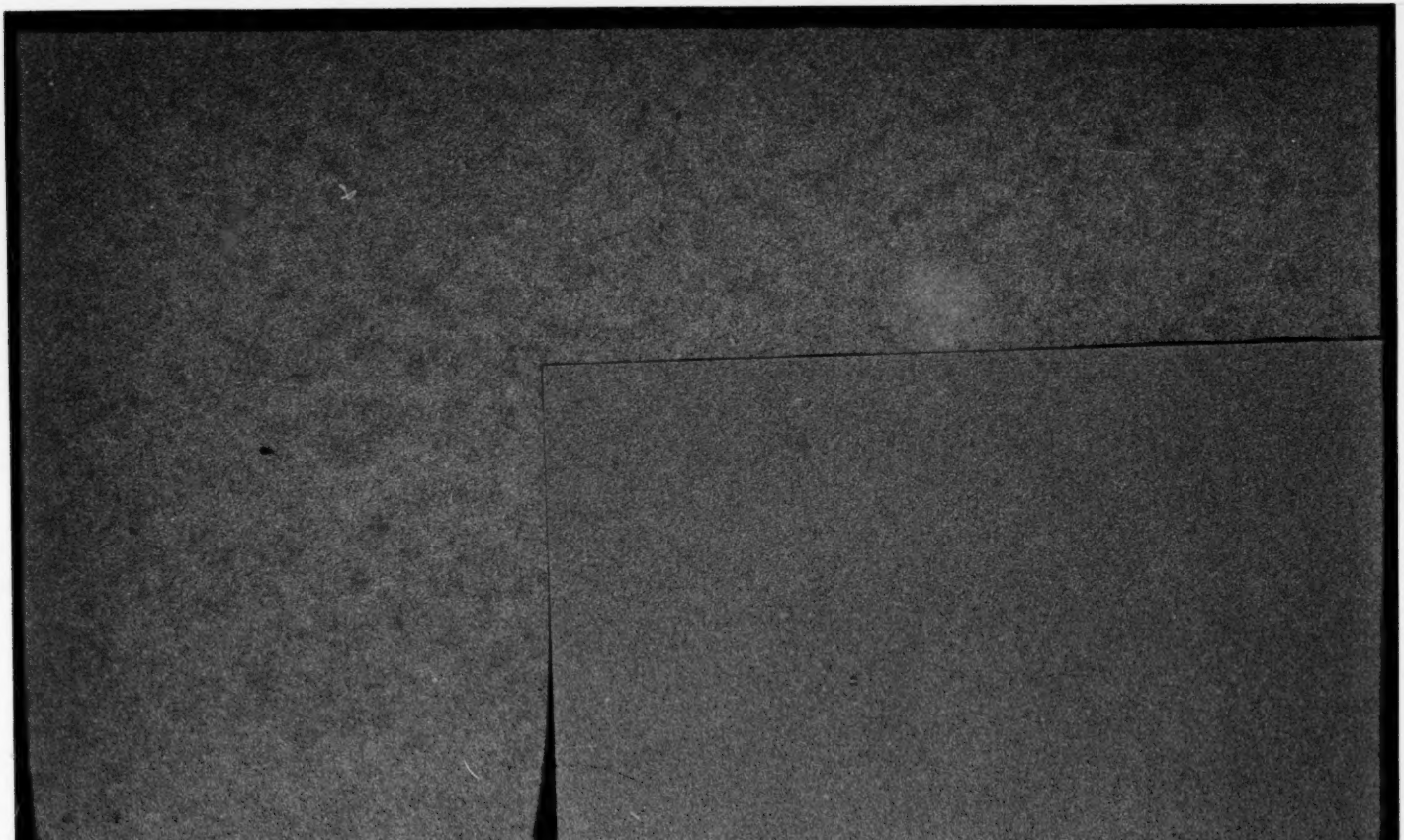
question that is involved in this motion or that is raised by the plaintiff's writ of error.

IV.

It is said by counsel that in filing the cross bill in the Federal Court and in preparing the decree I must have considered that Donahue and Vosper had a claim to the land which was sufficiently serious to justify me in making them parties to the cross bill and in framing the decree as it was framed. I, of course, considered that they were *asserting* a claim to the land and that it was desirable to have that claim declared void, and for that reason made them parties to the cross bill and procured a decree of the Court adjudging that they *had* no right, title or interest therein, followed by the usual provision in such decrees, that the decree should operate as "a release and conveyance" from them "of all right or title to said lands." That was very far from acknowledging that either Vosper or Donahue had any right, title or interest in the land.

Note:—By a typographical error in my main brief the case of Sayward vs. Denny was cited as being found in 168 U. S. 180. It should read 158 U. S. 180.

DAN H. BALL,
Attorney of Record for Defendants in Error.



DONOHUE v. VOSPER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 445. Argued January 26, 1917.—Decided March 6, 1917.

When it appears by the state court's opinion that both parties relied upon the construction and effect to be given a decree of a federal court, and that the court applied it against one of them, rejecting the construction relied on by the other, a federal question is presented which this court may determine on writ of error.

In a suit by the United States to determine the title to certain land, rival claims, arising independently under the public land laws and based on facts existing before the litigation, were asserted by two individuals on the one part and by two corporations on another. One of the individuals had deeded to the other with warranty before the suit, and the second corporation had succeeded to the first during its progress. By consent of the United States and the individuals a decree was entered declaring that the title at the commencement of the suit was fully and completely vested in the first corporation and, pending the suit, had become fully and completely vested in the second, that neither the United States nor the individuals had any right, title or interest in the land, that the title should be quieted in the second corporation against the United States and the individuals, and that the decree should operate as a release from the United States and each of the individuals of all right and title to the land and might be recorded as such in the county records.

Held, (1) That the decree should be construed, not as divesting any interest of the individuals or affecting their relations *inter sese*, but as adjudging that both were devoid of interest from before the beginning of the suit, and, consequently,

(2) That the covenant of warranty between them attached by estoppel to the title when afterwards acquired by the warrantor.

The warrantor, having acquired the title, conveyed to the plaintiff in error, the warrantee deeded part of his interest to another, and thereafter the plaintiff in error joined with the warrantee and the latter's grantee in an option and lease of the property, reciting the warrantee's interest. *Held*, that this was a practical construction of the decree to the effect that it had not disturbed the warranty.

A decision by a state court against a claim of title by adverse possession,

where the question is essentially local and dependent on an appreciation of evidence as to the conduct of parties, is not reviewable by this court.
189 Michigan, 78, affirmed.

THE case is stated in the opinion.

Mr. A. H. Ryall for plaintiff in error.

Mr. Dan H. Ball for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to declare certain deeds to lands in Michigan to be void, and that plaintiff in error (as he was plaintiff in the court below we shall so refer to him) be declared to be the owner of the lands and of the minerals therein, that defendants have no title thereto, for an accounting of certain royalties collected by certain of the defendants from the Buffalo Iron Mining Company and that the latter be restrained from paying any further royalties. The lands are described as follows: W. ½ of N. W. ¼ and N. W. ¼ of S. W. ¼, section 23, T. 43 N., R. 35 W., County of Iron, Michigan.

An answer, which was also claimed to be a cross bill, was filed, and upon the issues thus formed, and after hearing, the court by a decree dismissed the bill, adjudged title to the land to be in the defendants Vosper, Abbott and Tonkin in certain proportions and all the ores and minerals therein, that title to the lands in the proportions mentioned be quieted against plaintiff and all persons claiming under him, that he execute a deed to Vosper, Abbott and Tonkin of the interests decreed and in default thereof the decree to operate as such release and conveyance.

The decree was affirmed by the Supreme Court of the State.

The facts of the case were found by the Supreme Court substantially as follows:

The land was conveyed to the State of Michigan to aid in the construction of two railroads, one to Marquette and the other to Ontonagon. The land applicable to the Marquette road was released by the State to the United States and later, in 1866, under an act of Congress granting lands to the State for canal purposes, this land inured to the benefit of the Lake Superior Ship Canal, Railway & Iron Company by a grant from the State.

The land to be used for the benefit of the Ontonagon road was not released and it was subsequently decided that the title to an undivided one-half of the "common lands"—that is, lands at the intersection of the proposed railroads—still remained in the State for the purposes of that road, except as affected by an act of Congress of 1889 by which Congress declared a forfeiture of grants in the State of Michigan for all unconstructed railroads and confirmed title in all persons who had made cash entries within the limits of the grants and all persons claiming state selections, such as the Canal Company. By an exception in the act the title was not confirmed to those lands on which there were *bona fide* preëmption or homestead claims asserted by actual occupation on May 1, 1888.

Michael Donohue, plaintiff's grantor, together with various other persons, had entered upon these "common lands" as preëmptors and homesteaders, and asserted rights thereto under the Act of 1889 referred to above.

Prior to the Act of 1889 the Canal Company brought ejectment suits against those settlers. In 1894, in the ejectment suits, it was decided that the title of the Canal Company to the lands selected by the State was confirmed by the Act of 1889, subject to the exceptions provided in the act, and that it should be determined in an equity suit in the United States court what lands came

within the excepting clause. It was also decided that the title of the State to the lands granted for the Ontonagon road, including an undivided one-half of the "common lands," was forfeited to the United States.

Defendant Vosper had rendered service in this litigation to Donohue and the other claimants and took from Donohue a warranty deed on December 29, 1894, to an undivided one-quarter interest in the land.

At the instigation of persons claiming under the Act of 1889, the United States filed a bill against the Canal Company. In that suit the Canal Company filed a cross bill against the claimants under the homestead and preëmption laws, including Donohue. Vosper was also made a party. The issue in the litigation, therefore, was whether Donohue and the other claimants were *bona fide* homesteaders or preëmptors on May 1, 1888.

Pending the suit the Canal Company conveyed to the Keweenaw Association, Limited.

A decree was entered, Donohue and the other claimants and Vosper consenting, quieting the title to the lands in the Keweenaw Association, Limited, as successor of the Canal Company. The decree was entered in 1896 and adjudged that the Canal Company at the commencement of the suit was fully and completely vested with the title to the lands and since the commencement of the suit it became fully and completely vested in said Keweenaw Association, Limited, as successor of the Canal Company, and that neither the United States of America nor any of the defendants consenting to the decree had "any right, title, or interest therein." And it was adjudged that title to the lands be quieted against the United States and the consenting defendants and further that the decree should operate as a release and conveyance from the United States and each and every of the other of said defendants of all right and title to said lands and might be recorded as such in the records of the proper county.

November 19, 1896, the Keweenaw Association, Limited, conveyed the lands by quit-claim deed to Donohue.

It is the contention of Vosper that he and Donohue agreed to this arrangement, by which a sum of money was to be paid for the timber cut and the lands were to be conveyed by the Keweenaw Association to Donohue.

December 3, 1896, Michael Donohue delivered to plaintiff a quit-claim deed to the premises and on April 3, 1908, Vosper quit-claimed an undivided one-eighth interest to defendant Abbott, and on December 18th following plaintiff joined with Vosper and Abbott in the execution and delivery of an option for a mining lease of the premises.

February 3, 1909, Abbott quit-claimed an undivided one-thirty-second interest in the minerals to Tonkin, and on March 7, 1910, plaintiff joined Vosper, Abbott and Tonkin in the execution and delivery of a mining lease in pursuance of the option given before.

The mining lease, which was for a term of 30 years, was issued to the Niagara Iron Mining Company as lessee and was by that company assigned to the Buffalo Mining Company. The Niagara Company was and the Buffalo Company has been and is now in possession of the premises for mining purposes.

The trial and supreme courts found that Donohue executed the deed to Vosper. About this there is no controversy. Here the contentions of the parties turn upon the effect of the decree which was rendered by consent in the suit of the United States against the Canal Company, and this makes, it is contended, a federal question.

Defendants, however, assert that the decree does not present a federal question and that, besides, it was not claimed or urged as such by plaintiff in the state courts but appears for the first time in the petition for writ of error, and defendants refer to the bill of complaint to sustain their assertion.

But the Supreme Court in its opinion declared that a contention of plaintiff invoked "the effect of the decree of the federal court." And, discussing the decree, the court decided that its effect was "to oust Vosper from the land, of which he had the actual or constructive possession of an undivided quarter interest,—it appearing that Michael Donohue continued in possession of the undivided one-half of the claim from the time of his original entry until his quit claim deed to the complainant [plaintiff], despite the alleged trespasses of the canal company and its successor, which possession would inure to Vosper under the warranty deed." And the court further said that by the paramount title thus established in a third party by the decree Vosper was evicted from his title and possession and a "clear case for the application of the doctrine of estoppel by warranty" is made in his favor.

The decree, therefore, was made an element in the decision against plaintiff, and it was claimed by him to be an element in his favor. The motion to dismiss is, therefore, denied.

The contention was in the state courts and is here that the decree operated as a conveyance from Michael Donohue and Vosper to the Keweenaw Association and that by virtue of its effect as a conveyance it released the interest that Vosper had in the lands through the warranty deed from Donohue to him and that no interest remained in Vosper upon which an estoppel could rest. In other words, that by the decree Vosper's interest passed to the Keweenaw Association and from the latter to Michael Donohue; and a number of cases are cited to show that Vosper could make a conveyance of his interest and that his grantee, in this case the Keweenaw Association, and plaintiff through the latter, would take his interest.

The contention puts out of view a great deal that is material in the situation. The suit in which the decree was entered was one to determine whether the Canal

Company or its grantee, the Keweenaw Association, had derived title from the United States or whether Donohue had. Vosper was made a party because of the deed from Donohue to him and the decree quieted title in the Keweenaw Association. If it had gone no further there would probably be no dispute about its effect, but it declared that it should "stand and operate as a release and conveyance from the United States, and each and every of the other of said defendants, of all right and title to said lands" and might "be recorded as such in the records of the proper county." Standing alone these latter words might have the effect for which plaintiff contended, but they must be construed by what precedes them and by the nature of the suit. This demonstrates that the decree was but the clearing away of obstructions to the rights of the Keweenaw Association and was not intended to convey to it any interests the defendants had but left unaffected whatever obligations existed between themselves. This is found by the Supreme Court of the State and that Michael Donohue was paid a sum of money by the Keweenaw Association for the timber cut upon the land and the land was to be conveyed by the Keweenaw Association to Michael Donohue, leaving, as we have said, the rights between him and Vosper unaffected, and this is demonstrated by their subsequent relations.

On April 3, 1908, Vosper quit-claimed an undivided one-eighth interest in the land to Abbott and in the following December plaintiff and Vosper and Abbott executed and delivered an option for a mining lease of the premises and subsequently a lease in fulfillment of the option to the Niagara Iron Mining Company for the term of 30 years. The option and the lease recited that Vosper was the owner of an undivided one-eighth interest in the land.

It is further contended that plaintiff had acquired title to the land by adverse possession, but the state court

decided against the contention. This was essentially a local question, involving an appreciation of the evidence as to the conduct of the parties, and we cannot review it.

Decree affirmed.